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ABSTRACT

This collection of 17 papers addresses current issues related to collective bargaining in higher education and the professions. The papers include: (1) "The American Academic Model Abroad" (Irwin H. Polishook); (2) "The European Perspective" (Gerd Kohler); (3) "Economic Integration in the North American Region: Implications for Higher Education" (Hugo Aboites); (4) "The Revolution Is Being Televised: Distance Education and the University of Maine System" (Samuel J. D'Amico); (5) "Threats to Tenure: Rhetoric and Reality" (Mary Alice Burgan); (6) "Union Activism: The Response to Regression" (Solomon Barkin); (7) "Public Higher Education Funding in the Jaws of Balanced Budget Conservatism" (William E. Scheuerman and Sidney Plotkin); (8) "Funding Higher Education in a Global Economy" (Christine Maitland); (9) "Fiscal Realities in Higher Education" (Gordon K. Davies); (10) "Dealing with Sexual Harassment in the Academic Environment" (Cynthia Adams); (11) "Sexual Harassment and Academic Freedom: A Faculty Union Perspective" (Judith Anderson); (12) "Sexual Harassment and Academic Freedom" (Ralph S. Brown); (13) "Faculty Collective Bargaining at Historically Black Colleges and Universities" (Stephen L. Finner and Marcella A. Copes); (14) "The Changing Nature of Professionalism: The Case of the Police" (Barbara Raffel Price); (15) "Campus Bargaining and the Law: The Management Perspective" (Susan L. Lipsitz); (16) "Campus Bargaining and the Law: The AAUP's Perspective" (Ann H. Franke); and (17) "Employer Militancy in Professional Sports" (Ira Berkow and Eugene Orza). (MDM)

HIGHER EDUCATION COLLECTIVE BARGAINING: BEYOND THE BOUNDARIES

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Proceedings
Twenty-Third Annual Conference
April 1995

FRANK R. ANNUNZIATO, Director
BETH H. JOHNSON, Conference Organizer

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National Center for the Study of Collective
Bargaining in Higher Education and the Professions
School of Public Affairs, Baruch College,
The City University of New York

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INTRODUCTION

INTRODUCTION

The theme of the National Center's 23rd collective bargaining in higher education conference, **Beyond the Boundaries**, emphasizes the extent to which the traditional limitations in higher education, for better or worse, are being stretched, pushed, and reformulated. "*O tempora, o mores*!" "Oh the times, oh the customs!" Cicero shouted 2,000 years ago. Rome's greatest orator would have been completely flabbergasted with some of the recent developments in higher education, especially with the powerful movement towards greater internationalization, and some would argue homogenization of the world's colleges and universities, extending the boundaries of academia to the entire planet. Cicero never would understand that with high technology and distance learning, the electronic university is born, allowing courses and academic programs to be "beamed" into remote geographic areas, and into everyone's living room, through satellites, telephone lines, modems, computers, television, etc.

With the movement towards greater internationalization and with high technology and distance learning, higher education is rapidly eliminating two boundaries thought to be fixed and certain for centuries at colleges and universities: time and space. What does this mean for faculty, administrators, and for labor relations at the academy? This is the central question of our 23rd annual conference.

All of our conferences endeavor to bring together speakers and topics from a wide-range of concerns, in addition to our central theme. This year's program was no exception; we assembled experts on such diverse areas as the funding of higher education, academic freedom and sexual harassment, higher education at historically black colleges and universities, and the changing nature of professionalism. Each day of the conference featured a recognized authority on higher education or collective bargaining as a luncheon speaker. We also continued a long-standing tradition of inviting a management and a labor attorney to analyze the outstanding legal developments effecting higher education during the past year. Finally, since this year witnessed the longest sports strike in the nation's history, we included a panel on employer militancy in professional sports, focusing especially on major league baseball.

Ronald Berkman, Acting Dean of Baruch College's new School of Public Affairs, welcomed the conference participants. In his remarks, Dean Berkman underscores the multi-disciplinary approach of Baruch's School of Public Affairs. Among its many other academic disciplines, Baruch's School of Public Affairs includes both educational administration and labor-relations which, according to Dean Berkman makes this new school truly unique among schools of public affairs or public policy around the nation. Dean Berkman also states that the multi-disciplinary aspects of Baruch's School of Public Affairs makes it an ideal home for the National Center for the Study of Collective Bargaining in Higher Education and the Professions since, in its research and outreach functions (especially the

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annual collective bargaining conference), the National Center must call upon authorities from many areas.

INTERNATIONALIZATION OF HIGHER EDUCATION

Irwin H. Polishook critically appraises how the rest of the world is adopting U.S. conventions and models of higher education to transform their colleges and universities. He focuses, first, upon the European Economic Community (EEC). The twelve EEC nations are creating "an academic common market," the tenets of which, according to Professor Polishook, "...sound very familiar to American ears." Next, he describes the activities of the World Bank in the Third World to establish American higher education "as a standard." The results of the World Bank's involvement with higher education in the Third World are not terribly impressive and it has shifted its attention to primary and secondary education in the world's poorest nations.

Both in Europe and the Third World, and Professor Polishook argues in the United States as well, the impetus for reform of higher education is more motivated by economic reasons (to make us more internationally competitive) rather than to encourage the pursuit of truth. Professor Polishook rhetorically challenges whether this is correctly the most important mission of higher education.

Gerd Kohler describes the rapid homogenization of European higher education over the past decade, especially since the collapse of communism in Germany. Dr. Kohler shows how the academic community's desire for greater unfettered research and teaching opportunities are thwarted by severe cutbacks in public support of European colleges and universities. In addition, the ideology of privatization, always so popular on our side of the Atlantic, has grown considerably in Europe with respect to higher education. Colleges and universities are expected, just like in the U.S., to rely more upon tuition and contractual finances, rather than upon state fiscal support. Dr. Kohler ends his essay with a call for greater faculty and trade union participation in these monumental decisions which are sweeping Europe.

Hugo Aboites helps us to understand the various reasons for the implementation of the North American Free Trade Agreement (NAFTA). He posits the notion of the process of "economic integration" as bringing the economies of Canada, the United States, and Mexico, closer together. But, according to Aboites, this economic integration will have a huge, and negative social cost to the poor in all three countries. In fact, Professor Aboites claims the price is already being paid in Mexico, as seen by the precipitous collapse of the peso this year. Professor Aboites describes how NAFTA specifically impacts upon higher education in all three countries. Faculty members and their unions have had little to say in the new and much more homogenous higher education model which NAFTA seems to be creating.

HIGH TECHNOLOGY AND DISTANCE LEARNING

Samuel J. D'Amico discusses the societal causes for the growth of distance learning in the United States. He describes how the State of Maine, geographically one of the largest states in the union, has employed distance learning and its impact upon collective bargaining. D'Amico believes that while distance learning has raised many questions, it has also delivered substantial educational services in the State of Maine to people who might never have had the opportunity, because of geographical isolation, to earn a college or graduate degree.

LUNCHEON SPEAKERS

Mary Burgan, General Secretary of the American Association of University Professors (AAUP), was our first day's luncheon speaker. In her remarks, Professor Burgan describes the numerous threats to the institution of tenure which confront faculty members and their unions. Flowing from this new "accusatory rhetoric," tenured faculty have become the academic equivalent of welfare mothers and deadbeat dads, in that, they are the source of all the ills that befall the academy. The abolition of tenure is the main goal of this "Contract for Academia." Excessive rhetoric is not the only attack to tenure today. Professor Burgan carefully describes the growth of part-time, and non-tenured track faculty on the nation's campuses. She fears a "deeply stratified academic community" comprised of a "...decreasing number of haves." Finally, Professor Burgan offers six areas of "resistance" faculty members can take to prevent a further erosion of tenure.

Our second day luncheon speaker, **Solomon Barkin**, reminded us of the numerous positive accomplishments which the labor movement has contributed to post World War II society, emerging from the depths of the Great Depression, not just on behalf of its members, but for the betterment of the entire nation. Barkin also analyzes the conditions which contributed to the decline of the labor movement in the United States and throughout the world from the early 1970s. He sketches out the blueprint of a plan for a renewal of trade union organization, in the face of what he calls the "rattle of the drums of regression."

FUNDING HIGHER EDUCATION

William Scheuerman and **Sidney Plotkin** discuss the growth of the ideology of Balanced Budget Conservatism and its fiscal implications upon public higher education. In most regions of the country, public higher education has suffered severe cutbacks from state and local governments, at the same time that the federal government has radically decreased its commitment to all kinds of student loans and grants. Politicians from all political persuasions have embraced Balanced Budget Conservatism, according to professors Scheuerman and Plotkin, to mask the failures of the private economy to create good paying jobs and to keep wage levels high.

Christine Maitland comments upon the lamentable contradiction which is currently confronting the mission and funding of higher education. On the one hand, numerous authorities, including Secretary of Labor Robert Reich, have written that the key to economic competitiveness in this new "information age" is a highly educated and mobile work force. On the other hand, however, economic support for higher education has declined considerably in the 1990s. Where is this highly educated and mobile work force going to come from, if access to higher education is limited only to the wealthy? Further, Dr. Maitland states, not only is the quality of the work force of the future threatened by the crisis in higher education funding, but the whole area of research and development, so vital for economic competitiveness in the new information age, is also challenged, since so much of research is conducted on the nation's campuses.

Gordon K. Davies tells us that two fiscal realities confront public higher education. First, other expenditures like criminal justice and medicare have greater priority status among voters and politicians. Second, there is an epidemic of tax cut fever throughout the land. Davies develops a three-prong strategy to help reestablish higher education funding as a high budgetary item at the state and federal levels. The cornerstone to Davies's strategy is "to articulate a set of moral purposes for higher education." Perhaps, higher education advocates have erred over the years in emphasizing exclusively pragmatic goals for higher education, like economic development, while our critics have waged a purely ideological war to argue against greater higher education funding.

ACADEMIC FREEDOM AND SEXUAL HARASSMENT

Cynthia Adams, **Judith Anderson**, and **Ralph Brown** explore some of the complex problems arising from society's commitment to eradicate sexual harassment in the work place with the academy's historic commitment to freedom of speech. The authors argue that everyone understands that so-called *quid pro quo* sexual harassment is illegal and improper, however, difficulties arise with what the courts have determined to be sexual harassment developing in a hostile work environment, in the context of higher education, with its longstanding tradition of academic freedom and freedom of speech. Finally, the three papers show us how two AAUP institutions, Committees A and W, have struggled to establish an AAUP policy on sexual harassment which does not compromise AAUP's views on academic freedom.

COLLECTIVE BARGAINING AT HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

Stephen L. Finner and **Marcella A. Copes** argue in this paper that the extent of collective bargaining at historically black colleges and universities is no different from other colleges and universities. Based upon hard empirical data, the authors debunk a common stereotype about historically black colleges and universities, viz., their faculties are not interested in unionization. In addition, Dr. Finner and Professor Copes argue that issues which are collectively bargained at historically black colleges and universities, as judged by a study of the tables of contents of four collective bargaining agreements at historically black institutions, are remarkably similar from school to school and remarkably similar to the issues bargained at all colleges and universities.

THE CHANGING NATURE OF PROFESSIONALISM

Barbara Raffel Price traces the largely unsuccessful history to professionalize police officers over the past century in the United States. According to Professor Price, the chief obstacle to the obtaining of police professionalism, which she defines in her paper in terms of five characteristics, is the "duty and right to use coercion" which, the author argues is the "antithesis of professionalism" which is understood as "service to clients." Finally, Professor Price elaborately analyzes the complexities and contradictions inherent to the establishment of the notion of "community policing" around the nation, from the police department's and the community's perspectives.

LEGAL UPDATE

Susan L. Lipsitz, from a management perspective, surveys numerous court and NLRB decisions issued during 1994 which have direct impact upon higher education collective bargaining. The significant issues among the court and NLRB cases that attorney Lipsitz discusses include: the retroactivity of certain sections of the 1991 Civil Rights Act, public employees speech rights, the usage of after-acquired evidence in age discrimination allegations, honoraria for government employees, nonenforcement of state labor law and section 301 of the National Labor Relations Act, agency shop fees and adequacy of information provided by bargaining representatives, exhaustion of remedies under collective bargaining agreements and court action, defining disabilities under the Americans With Disabilities Act (ADA), affirmative action, sexual harassment, the duty of fair representation, and employer interference in NLRB-supervised elections.

Attorney Lipsitz also addresses two important pieces of legislation enacted during early 1995. The first involves the final regulations to the Family and Medical Leave Act of 1993 which actually took effect on April 6, 1995. The second is President Clinton's Executive Order 12954 which permits debarment of federal contractors who permanently replace striking employees, issued on March 8, 1995.

Ann H. Franke, from a labor union perspective, reports on three pro-union legal developments. The first, President Clinton's Executive Order 12954, bans the hiring of replacement workers during strikes involving any contractors engaged in business of $100,000 or more with the federal government. The second legal development, the Supreme Court's United States v. National Treasury Employees Union, 63 U.S. L.W. 4133 (2/21/95) reaffirms the freedom of expression rights of government employees. The third pro-union legal development is the Supreme Court's decision, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). Here, in a case involving age discrimination, the Court ruled that evidence of misconduct acquired after the plaintiff's illegal termination on account of age discrimination could not be used to justify the employer's decision to terminate.

EMPLOYER MILITANCY IN PROFESSIONAL SPORTS

Joel Douglas presides over a lively discussion with **Eugene Orza**, associate general counsel of the Major League Baseball Players' Association, and **Ira Berkow**, sports columnist for the New York Times, on the question of employer militancy in professional sports during the 1994-1995 season. Attorney Orza and Mr. Berkow candidly answer questions posed to them by Professor Douglas and by audience members about this season's long baseball strike and offer insights into the strategies and tactics of both the owners and the players. There is also a brief discussion on the differences between the professional hockey and the baseball labor relations struggles this year. We present a transcript of this session.

THE PROGRAM

Set forth below is the program of the Twenty-Third Annual Conference listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed are those of the authors, not necessarily their organizations or NCSCBHEP.

MONDAY MORNING, APRIL 24, 1995

WELCOME
Ronald M. Berkman, Dean
School of Public Affairs, CUNY

COLLECTIVE BARGAINING UPDATE: 1995
Frank R. Annunziato, Director
NCSCBHEP, Baruch College

KEYNOTE - INTERNATIONALIZATION OF HIGHER EDUCATION

Speakers:	Hugo Aboites, Professor of Education Univ. of Autonoma Metropolitana
	Irwin Polishook, President Professional Staff Congress, CUNY
	Gerd Kohler, Executive Board German Faculty Union
Moderator/ Discussant:	VirginiaAnn Shadwick, President National Council of Higher Education, NEA

CONCURRENT SESSION A
HIGH TECHNOLOGY AND DISTANCE LEARNING

Speakers:	Samuel D'Amico, Associate V. Chancellor University of Maine System
	Cary Kurtz, Associate Director Contract Implementation, APSCUF

	Michael Moore, Director American Center for the Study of Distance Learning
Moderator:	Lois S. Cronholm, Provost Baruch College, CUNY

CONCURRENT SESSION A
SEXUAL HARASSMENT AND ACADEMIC FREEDOM

Speakers:	Cynthia Adams, Associate Dean Allied Health, Univ. of Conn.
	Judith Anderson, Past President University of RI, AAUP
	Ralph Brown, Professor Yale Law School
Moderator:	Esther Liebert, Dean Faculty & Staff Relations, Baruch

MONDAY AFTERNOON, APRIL 24, 1995

LUNCHEON
THREATS TO TENURE

Speaker:	Mary Alice Burgan General Secretary, AAUP
Presiding:	Arnold Cantor, Executive Director Professional Staff Congress, CUNY

CONCURRENT SESSION B
FUNDING HIGHER EDUCATION

Speakers:	William E. Scheuerman, President United Univ. Professions, SUNY
	Gordon K. Davies, Director Virginia Council of Higher Education
	Christine Maitland, Coordinator Higher Education Services, NEA
Moderator:	Frederick Lane, Professor Baruch College, CUNY

CONCURRENT SESSION B
CHANGING NATURE OF THE PROFESSIONS AND PROFESSIONALISM

Speakers:	Barbara R. Price, Dean, Graduate Studies John Jay College of Criminal Justice
	Katherine Kany, Staff Specialist Nurses Association
	Michael Letwin, President Assn. of Legal Aid Attorneys
Moderator:	Harold Greenberg, Professor Baruch College, CUNY

PLENARY SESSION C
HIGHER EDUCATION COLLECTIVE BARGAINING LEGAL UPDATE

Speakers:	Susan L. Lipsitz, Esq. Morgan, Brown, & Joy, Boston
	Ann H. Franke, Esq., Assistant Secretary and Counsel, AAUP
Moderator:	Laura Blank, Director of Labor Hearings and Appeals, CUNY

TUESDAY MORNING, APRIL 25, 1995

PLENARY SESSION D
LABOR LAW REFORM

Speakers:	James Florio, Former NJ Governor President Clinton's Pub. Sector Labor/Mgt. Cooperation Committee
	Paula Voos, Professor, University of Wisconsin Member, Dunlop Committee
Moderator:	Ronald M. Berkman, Dean School of Public Affairs, Baruch

SPECIAL PRESENTATION
FACULTY COLLECTIVE BARGAINING AT HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

Speakers:	Marcella A. Copes, Professor Howard University

Stephen Finner, Associate Director
College Bargaining, AAUP

PLENARY SESSION E
EMPLOYER MILITANCY IN PROFESSIONAL SPORTS

Speakers:	Ira Berkow, Sports Columnist *The New York Times*
	Eugene Orza, Associate General Counsel Major League Baseball Players
Moderator:	Joel M. Douglas, Professor Baruch College, CUNY

TUESDAY AFTERNOON, APRIL 25, 1995

LUNCHEON
ACTIVIST UNIONISM

Speaker:	Solomon Barkin, Professor Emeritus University of MA, Past President, IRAA
Presiding:	Frank R. Annunziato, Director NCSCBHEP, Baruch College, CUNY

SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, The City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference
- Publication, of the Proceedings of the Annual Conference, containing texts of all major papers.

- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.

- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.

- The National Center Newsletter, issued four times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs -- complete coverage of a major problem or area, sometimes of book length.

- Elias Lieberman Higher Education Contract Library maintained by the National Center containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

Members of The National Center's National Advisory Board and our Baruch College Faculty Advisory Board provided us with terrific ideas for speakers and topics for the conference. We are grateful to all our speakers, and to the moderators who chaired each of the sessions. Beth Hillman Johnson, the National Center's Administrative Director, devoted countless hours to ensure a successful event. We must also thank the National Center's staff, College Assistants Karen Daniel and Israel Alvarez.

Frank R. Annunziato
Director

HIGHER EDUCATION AND COLLECTIVE BARGAINING BEYOND THE BOUNDARIES

Ronald M. Berkman, Dean
School of Public Affairs, Baruch College

Let me join in welcoming you to this Conference on behalf of Baruch College and specifically the School of Public Affairs. As Dr. Annunziato mentioned, this is the National Center's twenty-third annual gathering. This is Baruch's twenty-seventh year as an independent senior college of the City University of New York. So as you can see, the National Center has been part of the College through a major portion of our history.

This year marks something of a change in the status of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, which explains why I am here this morning. This past September, Baruch officially inaugurated the new School of Public Affairs. This is not only the newest school of public policy or public affairs in the nation; it is also among the largest, the most closely focused on the problems and opportunities of urban America, the most innovative, and already on its way to becoming one of the best.

What makes us unique -- or if not unique, then certainly distinctive -- is the extraordinary degree to which we infuse our program with an interdisciplinary focus. Our 30-member faculty brings together people whose training is in economics, political science, sociology, communications, public administration, and other disciplines. Those people do not have identical perspectives or fields of expertise. But what they share -- a commitment to the study of public policy as a whole -- more than overrides their differences in background.

We understand in the School of Public Affairs that every public issue (including the ones you will be talking about today and tomorrow) has an economic component, a political component, a social component, a cultural component. We see the relationship between the public and private and not-for-profit sectors, and we see that the lines between government and business and the voluntary community are becoming blurred, in some cases disappearing entirely.

Beyond that, we recognize and accept and seek to strengthen the linkages between what have heretofore been viewed as discrete segments of the policy arena. We see for example, that decisions society makes -- or defers -- on health care have both intended and unintended effects on employment policy. We see that the quality and emphasis we put or fail to put on education programs will affect the rate of economic development. We see that national labor relations policy -- which you will be talking about in some detail here -- affects and is affected by the kind of public management we have at the federal, state, and local levels.

We held an inaugural conference last December on "Public Affairs and Management in the 21st Century," to which we invited about 150 practitioners and academics. One theme that emerged loud and clear is that no one can understand or influence behavior in any important aspect of public policy absent a reasonably close knowledge of the others. Nor can one deal with policy effectively on an exclusively economic or political level; the two strands are mixed, and our students need to know a great deal about both.

All this explains why we created the School of Public Affairs in its present configuration -- as a school without departments, without chairs, without rigid boundaries. What we wanted -- and what I think we have achieved -- is a forum for dialogue across the disciplines, clearly focused on public problems, but with a wide perspective informed by multiple currents of thought. Our students benefit from that perspective; our faculty thrive on it; and we think what emerges from it serves the New York community.

The study of educational administration and policy is integral to the School of Public Affairs. The question occasionally arises as to why Baruch incorporated education here, rather than in some kind of explicitly education-oriented program. Our answer is that the study of education administration and policy probably reflects more closely than any other field an integration of seemingly disparate but actually aligned disciplines: management, sociology, economics, political science. The people who run the nation's schools need to know something about each of those fields, and probably have more occasion to apply that knowledge, on a daily basis, than anyone in America.

We are sometimes asked a similar question about the role of another one of our programs, industrial labor relations. We have a similar response. This field 1brings together seemingly discrete intellectual currents and focuses on a specific and highly significant problem, with both an economic and management dimension.

What, then, could be a more natural home for the National Center for the Study of Collective Bargaining in Higher Education and the Professions? Like the School itself, the Center covers a major area of public policy. In its publications and meetings, and particularly at this annual conference, it brings together people from a number of disciplinary backgrounds and ideological perspectives. It takes an issue of great theoretical complexity and gives people who deal with that issue day-to-day the capacity to do so in a more informed manner. And perhaps in a more mundane sense, it integrates three fields that are particularly relevant to our own faculty's interests and talents -- education, labor relations, and public management.

We will be looking at each of those concerns over the next two days. The Center staff have put together a strong and comprehensive program, and I look forward to hearing what all of the participants have to say.

Again, I welcome you to Baruch, to this Conference, and to the School of Public Affairs.

I. INTERNATIONALIZATION OF HIGHER EDUCATION

A. The American Academic Model Abroad

B. The European Perspective

C. Economic Integration in the North American Region: Implications for Higher Education

INTERNATIONALIZATION OF HIGHER EDUCATION

A. THE AMERICAN ACADEMIC MODEL ABROAD

Irwin H. Polishook, President
Professional Staff Congress, CUNY

The transmission of the national culture is a responsibility assigned primarily, if it is assigned at all, to the elementary and secondary schools. For most students, who do not continue their learning,[1] this education is their only systematic exposure to what society deems essential unto itself. For all students, the values learned and absorbed in the years of schooling, from K to 12, are basic. That is why the schools draw most of the controversy about the teaching of values, why national allegiance is pledged there, and why prayer keeps demanding admission. That is why the burden of cultural orientation is not generally expected to be borne by our colleges and universities.

Higher education, by contrast, has always taken the world as its province. American college students are not generally required to study American history, and they would be hard put to find a course in "civics" in the curriculum. The academy's principals -- the professors, scholars, and researchers -- have traditionally considered themselves members of a community that knows no national bounds. The fruits of their work, their discoveries of new knowledge, are disseminated in journals and books and other media that are available to their counterparts wherever learning is taken seriously. In fact, effective familiarity with at least one language other than their own is a universal qualification of apprentice scholars. A purpose of this requirement, which sometimes seems arbitrary and superfluous, is to enable them to participate in the academic exchange that is international.

Within this context, nevertheless, national systems of higher education vary. They are different in their character, their magnitude, their structure and their quality. The American academy is so unique that, we often wonder, as Americans are compelled to do, whether our colleges and universities measure up. Our habit of self-examination and self-criticism has led us to suspect otherwise.

It is, therefore, instructive to examine two international arenas in which the United States is held up as a model. One is the European academic community that has been created to match and buttress the European economic community.

After two decades of planning, a broad and ambitious system of international articulation is emerging among the European Union's twelve national systems of higher education. They are developing what might be termed an "academic common market." Despite obstacles that match those raised against economic unity, the academic community is more than a gleam in the eyes of its planners. Its tenets, its stated purpose, and its objectives are fairly well-developed. They sound very familiar to American ears.

The plan, developed by the Commission of the European Communities,[2] attempts to present "a coherent approach" to what it calls "post-compulsory education and training." The only application to elementary and secondary schools is a proposal to prepare teachers to teach the "European dimension," in addition to the culture of the individual nations, a reaction to continental divisions, a recognition of the importance attached to the schools in the teaching of basic values.

It is significant to note at the very outset that the impulse behind the plan, its motivation and its primary function resemble those of similarly broad national plans developed in the United States. After deference is paid to such "wider responsibilities of higher education institutions" as "mobilising the creativity of people to advance the boundaries of knowledge" and to develop "'esprit critique,'"[3] the Commission focuses sharply and sustains its focus on its primary purpose, which is economic. It calls for the devotion of greater attention to the achievement of European excellence in the development of human resources, a challenge to which higher education and advanced training must respond. The efforts made in this regard should be designed to:

- provide the extended knowledge and skill requirements needed to exploit fully the economic advantages of the internal market;

- strengthen Europe's position in the global economy by the application of scientific and technical innovation to business and industry;

- take account of the particular demographic position which exists within the Community in meeting labour market needs both qualitatively and quantitatively over then next two decades;

- provide a distinctive contribution to the affirmed policies of the Community in relation to economic and social cohesion;

- recognise the extent to which cooperation in higher education and advanced training is being more and more a feature of the Community's relationships with third world countries;

- affirm the importance of safeguarding and strengthening Europe's cultural heritage in all its diversity;

- promote understanding across national boundaries so as to reinforce the concept of the Citizen's Europe and to strengthen, among young people in particular, the basis for further political development and for European Political Union.[4]

In the context of the 46-page document and of the voluble deliberations that preceded and followed it, one may fairly say that even the noneconomic goals are economic. The "cooperation," the safeguarding and strengthening of "Europe's cultural heritage" and the promotion of "understanding" across national boundaries that are recommended above are done so for no higher ideal than that they would be good for business -- just as President Clinton justifies federal support of education and research for their promotion of America's competitiveness in the global economy.[5]

The European Community is moving toward knocking down intersystemic barriers among their member nations and toward agreeing on changes that should be made in their separate academic systems for the good of all. Among them are the general expansion of higher education and the particular expansion of such high-skill disciplines as the information technologies, which will require in the 21st century "more highly educated and multi-skilled workers".[6] "More polyvalent forms of education and training will be necessary in order to enable workers to contribute to the objectives of successful innovation, high quality products and processes, flexibility in meeting consumer needs and adaptability to new technologies, new forms of industrial organisation and higher productivity".[7]

The United States has about 3,500 higher education institutions and 15.5 million students.[8] Europe has about the same number of colleges and universities but, with a larger population, only 6.75 million students.[9] Europe's college-going rate grew appreciably between the 1960's and the mid-1980's, but not sufficiently, according to the Commission, and not to the levels of the United States and Japan.[10] Whatever pride Europe has taken before in the selectivity and elitism of its universities is yielding to economic imperatives. Access with an American accent has become important as social policy. The Commission recommends "equality of opportunity for young people" and increased representation of "lower social class groupings" and "minority and disadvantaged groups."[11] In Europe, all this is new. What is more, the "free movement" of persons and services across national boundaries and the mutual national recognition of individual academic credentials -- like the routine interstate academic exchanges that we take for granted -- are put forward as a desideratum of community and the common economic interest.[12]

The Commission promotes "Europe in the curriculum" of the schools of all the member nations as a step toward strengthening the world presence of Europe and "integration within the community itself." But it quickly adds in terms that are all too familiar to us, "the Community has a rich diversity of languages and culture and the process of integration must be such as to preserve this diversity as it represents a storehouse of wealth which can contribute to the lives of all European citizens."[13] It envisions the creation throughout the community of a demand for a "European" education requiring a European focus that can "coexist with regional and national allegiances."[14] Anticipating a widening of the gap between the "professional/technical and academic/scholarly streams," it similarly echoes the recent American trend when it proposes the strengthening of the study of the humanities.[15]

Europe is now asking its nations to expedite the accountability of its higher education institutions and their self-assessment[16] and to diversify the sources of their funding as a means of relieving the competition for "scarce public resources."[17] This leads directly to the adaptions of tuition and private endowments to finance what before had been publicly supported institutions. It also asks its member nations to improve the articulation between their own individual higher education systems and their secondary schools and their collaboration with industry; to ease postsecondary admission requirements; to offer remediation ("preparatory courses"), and to give credit for "'maturity,' work experience and training achieved in the workplace." It further recommends that its members review financial aid alternatives "in the form of grants, loans, tax concessions, deferred payments, indirect subsidies" and differential tuition rates.[18] It calls for the improvement of instruction,[19] nontraditional curricula and program structures for a new nontraditional "clientele,"[20] inter-institutional consortia,[21] and a system of lifelong learning that would "support the emergence of a learning society."[22] To all of this we can say, "We have been there."

One of the ironies here is that at a time when the American academy is undergoing traumatic contraction, Europe is moving ahead -- and in areas and ways that had been pioneered by the United States. An effort to encourage students to attend institutions in other member countries -- ERASMUS (European Community Action Scheme for the Mobility of University Students) -- is already operational and "highly successful," with thousands of students participating and allocations of approximately $200 million.[23] As one Department of Education official has observed, "With 50 per- cent more population than the United States and a combined gross national product that is 90 percent of ours, the 12 countries would be formidable even unintegrated."[24]

The second overseas arena in which American higher education has been set up as a standard is the Third World. Since 1963, the World Bank has invested $5.7 billion in the post-secondary educational system of developing countries, the bulk of it in the past fifteen years.[25] Last year, the Bank reviewed this investment and proposed modifications of its direction.

Initially focused on the training of professionals and technicians for the economy and of teachers for the improvement of the schools, the World Bank more recently steered its resources toward advanced scientific training and research. The rationale was the "centrality" of research to knowledged-based economic growth strategies. The record, according to the Bank, shows mixed results. In Korea and China, where it would help shape the countries' own scientific infrastructure and institutional reforms, the Bank claims success. Elsewhere, as in sub-Saharan Africa, the World Bank found its investments created "well-funded academic oases that became unsustainable in the long run."[26] Reform has been resisted by various interest groups, including the governments themselves, whose relatively affluent leaders and their families benefited inordinately from new opportunities for university access and professional careers.[27]

In either case, the Bank has been disappointed by high levels of governmental subsidization of higher education, unmanageable enrollment growth, and declines in academic quality. The Bank therefore consigns to "the margin" its investment in higher education and reaffirms its major commitment to primary and secondary education.[28] At the same time it advances these judgments on the postsecondary systems of the developing countries:

- Governmental resources for higher education have declined and their use is inefficient. Newt Gingrich could not have put it better than this: "[I]t is possible to achieve a well-functioning, diversified, and growing higher education system even as public spending per student declines."

- Government funding should be linked closely to institutional performance and it should be supplemented by financing from other sources, including "a greater share ... from students themselves, who can expect significantly greater lifetime earnings as a result of receiving higher education and who often come from families with ample ability to contribute to the costs of education."

- Government should encourage the growing differentiation in higher education, beyond Europe's traditional one-tier model, to include such non-university institutions as professional and technical institutes and community colleges.

- Government should "provide support to qualified students unable to pursue their studies for reasons of inadequate family income." "Equity can be advanced by grant schemes targeted to the lowest-income students and by work-study programs."

- "The productive sector," i.e. industry and business, should be represented on the boards of public and private higher education institutions, to "help ensure the relevance of academic programs."[29]

Only industry and business can ensure the relevance of academic programs! We see in this what we see in the plans of the European Union and what we hear from Washington and state capitals here: the driving force of economics and privatization in determining public policy on higher education. "[I]t is critically important that training and research programs respond to the evolving demands of the economy."[30] Private institutions respond better to labor market conditions.[31] "Higher education investments are important for economic growth. They increase individuals' productivity and incomes, as indicated by rate-of-return analysis, and they also reduce significant external benefits not captured by rate-of-return analysis, such as the long-term returns from basic research and from technology development and transfer. Economic growth is a critical prerequisite for sustained poverty reduction in developing countries, which is the overarching objective of the World Bank."[32]

Like the European Commission in its own sphere, the World Bank is thus guided in its lending policies toward developing nations by the experience of American higher education. This influence acknowledges the success of the United States in spreading high-quality academic access. The American model, though, is not perfect. As we all too painfully know, it contains some deficiencies and, today, some misdirections which are not suitable for framing, or for export. There needs to be a higher degree of selectivity in what international agencies adapt from the United States for use elsewhere. AFT and NEA have been advocating that principle, among others, through organizations like Education International and through events like the International Conference of University Teachers' Organizations.

One other point is worth making: When we see the reflection of American higher education in the mirror of foreign institutions, our image takes on a new clarity. The reduction of poverty is a highly worthwhile purpose and economic growth is prerequisite to other modes of progress. But when the pursuit of material things becomes the beginning and the end of our national purpose, perhaps we are overlooking some things that are more essential. President Clinton said, in his State of the Union address last January, "The most important job of our government in this new era is to empower the American people to succeed in the global economy."[33] Perhaps. But it is certainly not the only important job of higher education.

ENDNOTES

1. In 1993, the last year for which figures are available, 41.6 percent of high school graduates enrolled in college. National Center for Education Statistics, Digest of Education Statistics, 1994, p. 189, Table 182.

2. The Commission of the European Communities, "Memorandum on Higher Education in the European Community," Brussels, Belgium, November 5, 1991.

3. Commission Resolution 4, pp. 1-2.

4. Commission Resolution 46, pp. 11-12.

5. "'Education is the fault line in America today. Those who have it are doing well in the global economy; those who don't are not doing well.'" Todd S. Purdum, "Clinton Says Tax Cuts Hinges on Incentives for Education," The New York Times, April 14, 1995, p. A12.

6. Commission Resolution 10, pp. 2-3.

7. Commission Resolution 11, p. 3.

8. National Commission for Education Statistics, Digest of Education Statistics, 1994, p. 242, Table 231, p. 174, and Table 167.

9. Commission Resolution 48, p. 12.

10. Commission Resolution 16, p. 5.

11. Commission Resolutions 27-30, p. 8.

12. Commission Resolutions 18-21, p. 6.

13. Commission Resolution 40, pp. 10-11, 13.

14. Commission Resolution 49, p. 12.

15. Commission Resolution 52, p. 13.

16. Commission Resolution 53, p. 14.

17. Commission Resolutions 56-57, pp. 14-15.

18. Commission Resolutions 62 and 74, pp. 16, 19.

19. Commission Resolution 62, p. 17.

20. Commission Resolution 64, p. 17.

21. Commission Resolution 66, p. 17.

22. Commission Resolution 67-68, pp. 17-18.

23. David Walker, "European Community Prepares to Establish a 'Common' Approach to Higher Education," The Chronicle of Higher Education, July 17, 1991, pp. A1, A30.

24. Charles Karelis (Director, Fund for the Improvement of Postsecondary Education), "The New Europe: Replace U.S. Indifference With Collaboration," The Chronicle of Higher Education, October 16, 1991, B1-B2.

25. The World Bank, Higher Education: The Lesson of Experience (Washington, D.C., 1994), p. 79.

26. World Bank, p. 82.

27. World Bank, pp. 83-84, 22-24. In Latin America, for example, "white collar employees make up only 15 percent of the population, but their children account for 45 percent of higher education enrollment" (p. 23).

28. World Bank, pp. 12-13.

29. World Bank, "Executive Summary," pp. 1-4.

30. World Bank, p. 71.

31. World Bank, p. 34.

32. World Bank, p. 84.

33. President Bill Clinton, State of the Union Address (Washington, D.C.: The White House), January 24, 1995, p.8. In the previous year, he asserted that we must, through Goals 2000, "measure every school by one high standard: Are our children learning what they need to know to compete and win in the global economy?" State of the Union Address (Washington, D.C.: The White House), January 25, 1994, p.4.

INTERNATIONALIZATION OF HIGHER EDUCATION

B. THE EUROPEAN PERSPECTIVE

Gerd Kohler, Gewerkschaft Erziehung und Wissenschaft (GEW),
The German Trade Union for Education and Research

More than eight years have passed since I was invited to Baruch College for the first time - in 1986, together with a GEW delegation. At that time, Joel Douglas introduced us thoroughly to collective bargaining at American higher education institutions. We have learned a lot. It is also on account of this that I gladly accepted the invitation of Frank Annunziato to address this conference on the "Internationalization of Higher Education." With my contribution, I would like also to show my thanks to those who have participated in intensifying collaboration between the USA and Germany in the area of higher education. I would particularly like to mention Irwin Polishook, but also Ann Shadwick, and Ernst Benjamin.

Let me just tell you a little story about a bus trip in South Africa. En route from Johannesbourg to Pretoria, the driver calls his passengers: "All alight. I want to give a small speech for you. Apartheid is over, and from now on there will be no segregation of blacks and whites on my bus. I only know green people. Thank God for Mandela and de Clerk! Let us get on the bus again; the light greens can sit in the front and the dark green can occupy the rear seats."

This little story is supposed to show that political situations can change, even if they seem to have been stuck in a rut for decades. The collapse of the Berlin Wall, economic and social changes in the eastern European countries or the peace talks between the Israelis and the Palestinians underscore this proposition. But, just like the little South African story, they also show that far-reaching processes of learning have to take place if proclamations are really supposed to lead to new, democratic, economically sustainable, and peace promoting social relations.

Here, too, a challenge is posed to science and higher education, provided they want to acknowledge their social responsibilities not only in a national, but also in an international framework.

I would like to approach my topic from two directions; on the one hand, I want to attempt a definition, and on the other, I would like to give an exemplary description of what internationalization can mean in practical terms.

> In its "Policy Paper of Change in Higher Education," UNESCO writes: The Internationalization of higher education is first of all a reflection of the universal character of learning and research. It is reinforced by the current processes of economic and political understanding, as well as by the growing need for intercultural understanding. The expanding number of students, teachers and researchers who work, live and communicate in an international context attests to this trend. The considerable expansion of various types of networking ... among institutions, academics, and students is facilitated by the steady advance of information and communication technologies.
>
> International co-operation should be based, above all, on partnership and the collective search for quality and relevance in higher education. The deteriorating conditions in which higher education institutions function, particularly in some developing countries, require international solidarity. (p.33).

This is the UNESCO definition. Now for some examples:

- A student of architecture at the Technical University of Berlin goes to Manchester for two semesters, in order to prepare herself regarding her discipline and language skills for a labor market that is, in principle, supposed to be open all Europeans in the future. She would like to have her study costs covered.

- A postgraduate student of medicine communicates via Internet with a team of researchers at the University of Uppsala in Sweden in order to keep informed about the internationally achieved state-of-the-art in research and to avoid dead ends in his own research work. He is looking for free access to scientific data.

- A physicist at the University of Munich goes to Geneva in order to conduct research work at the European Laboratory for Particle Physics, and, in parallel, to teach in Grenoble, France. He wants, at least, to maintain the salary level he has reached, his working conditions and social insurance.

- Biotechnical research institutes in several countries of the European Union apply at the European Commission for research promotion funds. They want to see equal terms of competition.

- Polish and Czech universities seek bilateral or multilateral collaboration in the context of reforming higher education and science in their countries. They want assistance so they can help themselves, without any political or missionary strings attached.

- The South African Union of Democratic University Staff Associations (UDUSA) asks for support in creating regional higher education institutions in parts of the country that have been neglected by the apartheid regime.

These examples demonstrate not only how close the academic world has come together, and how much the internationalization of higher education has developed, but also how difficult it is to put it into practice.

Governments have created instruments they can use to attune national policies to each other. In accordance with the rules of enlightened absolutism, they alone usually decide what is good, and what is not good, for higher education institutions and people working in them.

I would first like to demonstrate how they do this, and how students and academics and the unions representing them react with the aid of a European example. I will refer to the international arena.

THE EUROPEANIZATION OF HIGHER EDUCATION AND RESEARCH

Less than 20 years ago, the ministers who were responsible for education policy in the then six member countries of the European Community got together for the first time in order to stipulate to an action program in which education policy, and in particular vocational education policy, would be a focal point in the course of European integration. The education institutions were also supposed to be supported, and one wanted to intensify the exchange of school pupils and students, teachers, scholars, and scientists. Furthermore, there was a desire to improve collaboration through a comparison of education systems that did differ considerably. Subsequent to the enforcement of the Single European Act (July 1, 1987), joint programs were agreed upon that were to implement these goals. I would like to refer briefly to four of these programs:

(1) LINGUA

From 1990-94, about 250 million dollars was made available for the furtherance of proficiency in foreign languages. Job related continuing education of over 12,000 foreign teachers, improvements in teaching and studying in the field of foreign language training at higher education institutions (about 50,000 students participated) and the promotion of foreign languages that are spoken at work, in companies, and administrations were the focal points of this program.

(2) ERASMUS

From 1990-92, about 240 million dollars was put at the disposal of the exchange of students and lecturers, for the development of common curricula and the promotion of collaboration between higher education institutions. The ERASMUS program also supported the establishment of a general system for the recognition of higher education diplomas (Community Network of National Academic Recognition Information Centres -- NARIC). This also includes the European Community Course Credit Transfer System (ECTS), which is supposed to enable a full recognition of courses that were taken at higher education institutions of the European Union.

(3) COMETT

For 1990-94, 250 million dollars was provided for the EC countries, and an additional 40 million dollars for the EFTA states, in order to promote educational partnerships between higher education institutions and industrial companies, and for joint continuing education programs in the field of new technologies.

(4) TEMPUS

The "Trans-European Mobility Scheme for University Studies" is part of the PHARE program, a general scheme of EC for the economic and social restructuring of the central and eastern European countries. From 1990-93, a total of 400 million dollars was spent on this program.

With the aid of these programs and the closely related issue of the "policy of clever money," a large part of national reservations towards a "European education policy" has been reduced. This applies in particular to the financially weaker member states that have to rely upon support from Brussels, if they do not want to opt out of European integration.

A broad discussion over the "Memorandum on Higher Education in the European Community," which was submitted by the European Commission, and the "Green-Paper on the European Dimension in Education" (1992/93), prepared the new education and research policy regulations of the "Maastricht Treaty," which came into force on November 1, 1993.

On this basis, the programs run so far have been evaluated, and with SOCRATES for the area of general education and with LEONARDO for the area of vocational education, two new programs have been developed.

These objectives are clearly described in the White Paper: "Growth, Competitiveness, Employment," which was adopted by the European heads of state and governments on December 10-11, 1994.

> In resuscitating growth and re-establishing the competitiveness and a socially acceptable level of employment in the European Community, education and training -- in addition to their basic mission of promoting the development of the personality and values of citizenship -- are given a crucial role ... One now expects education and training to find a solution to the problems companies are facing in trying to stay competitive, the employment crisis, the drama of social discrimination and marginalization -- in a word, that they will help society to overcome its current problem ... (page 128).

Educational institutions alone will not achieve this, but they can contribute to solving problems. Therefore, the White Paper demands in part:

- timely estimates of the demand for qualifications
- close links between studying and professions
- more intensive cooperation between higher education and industry
- an extension of academic continuing education offerings
- the privatization of training costs, through the introduction of education vouchers
- the reinforcement of the European dimension in teaching and studying, and
- the decentralization of education administration through the enhancement of the self-administration rights of higher education institutions.

The orientation on the economic policy objectives of the European Union becomes even clearer in the statements of the White Paper on research and technological development (pp.94). There it says:

> In comparison with its competitors, the Community invests less. If all types of expenditure are added up (Public and private, civil and military), research, technology and development expenditures amounted to about 135 billion dollars in the Community, 160 billion dollars in the USA and 100 billion dollars in Japan. In the member states of the EC, this corresponds to a value of an average 2 percent, in the USA 2.6 percent, and in Japan 3 percent of the gross national product, or, in relation to the population, 393 dollars per inhabitant in the EC in comparison to 640 dollars in the USA and 615 dollars in Japan.

In order to re-establish competitiveness, the White Paper suggests that the research budgets be raised, step-by-step, to three percent of the gross national product. A better utilization of the research results achieved in the Community is needed. The call that technology transfer between higher education institutions and companies be intensified, the coordination of European research programs and activities be extended, and different research institutions be encouraged to attune their activities to each other is also required. New research initiatives are to be introduced. They are now reflected in the "4th Framework Program for Research and Technology of the European Union".

Who are the most important parties in the development of an informed opinion and decision-making regarding European higher education and research policy?

First of all, there are the national governments and parliaments, who guard their rights Argus-eyed and see to it that the European Commission and European Parliament limit their initiative to competencies that have been established by the Maastricht Treaty. The subsidiarity principle is in force, according to which the European Union should only engage in tasks or promote ventures that cannot be carried out at the national level. Cross-border cooperation and coordination is supposed to yield a "European surplus value."

The national governments are represented either in the European Council (the heads of governments and states) or in the Council of Ministers (the respective department heads).

The rights of the European Parliament have been strengthened by the Maastricht Treaty. It has already demonstrated this in deliberations on the 4th Framework Program or the Socrates Program.

On the suggestion of Jacques Delors, the then President of the European Commission, the "Social Dialogue" was established, in which the European Trade Union Confederation (ETUC) (for the trade union side), the Union of Industrial and Employers Confederations of Europe (UNICE) for private industry, and the European Centre of Public Enterprises (CEEP) participate on behalf of the public sector. This type of dialogue is recognized by Article 118b of the EC Treaty, as supplemented by the Single European Act, which stipulates that "The Commission shall endeavor to develop the dialogue between management and labor at the European level which could, if the two sides consider it desirable, lead to relations based on agreement." Several "joint opinions" are the not insignificant outcome of this concerted action so far.

The Economic and Social Committee (ECOSOC) consists of representatives of all sectors of economic and social life. The Council and the Commission itself must consult ECOSOC, as specified in the Treaty. The Committee has frequently been asked to give its opinion on education questions and programs. These opinions have to be published in the official Journal of the European Commission.

In addition to these official institutions, there are special bodies representing the interests of the higher education and research sector: the Liaison Committee of the European Rector's Conferences and the CRE, which represents more than 450 higher education institutions of the European states.

On the trade union side, there is the European Trade Union Committee for Education (ETUCE), which represents all sectors of education. All trade unions and associations having members in the higher education and research sector participate in the ETUCE Standing Committee for Higher Education and Research. ETUCE has given statements on crucial issues of European higher education and research policy (e.g. in the EC Memorandum on Higher Education). ETUCE conducted international Colloquia, e.g. on "Quality of Higher Education." ETUCE organizes lobbying activities relating to the European Parliament and the European Commission.

Anyone who is involved in higher education and research policy at the international level has to face a network of institutions which are controlled by government representatives whose word is almost exclusive. This applies both to the OECD and to UNESCO. The situation is more open in the committees of the International Labor Organization (ILO), which are organized on a tripartite basis.

In addition to state representatives, there are representatives of employers and the trade unions. The World Bank and the International Monetary Fund are oriented even more one-sidedly.

All these organizations set framework data for international higher education and research policy which frequently mean painful curbs on national developments. I would like to analyze trends and describe current policies, and then develop suggestions as to how the voice of the union can make itself more audible.

UNESCO

Early in 1995, UNESCO published the "Policy Paper for Change and Development in Higher Education," fulfilling an assignment of the 27th General Conference which took place in Geneva in November 1993. Three main trends are described in the paper:

- quantitative expansion, which is nevertheless accompanied by continuing inequalities in access,
- diversification of institutional structures, and programs, and
- forms of studies and financial constraints which are widening the gap between growing expectations and the chance to realize these under the conditions of permanent underfinancing.

UNESCO focuses its proposals on relevance and quality as the key features for a forward-looking higher education policy and seeks to promote diversity among higher education institutions. UNESCO asks the higher education institutions to improve their management and to make more efficient use of the human and material resources available. UNESCO discusses the introduction of tuition fees and the search for alternative funding resources, underlining that public support to higher education remains essential to ensure its educational and social mission.

UNESCO demands a modernization of the infrastructure and new links with the world of work in a broad sense. Particular importance will be attached to promoting the principles of academic freedom and institutional autonomy. UNESCO says that it will extend its support and cooperate with Nongovernmental Organizations (NGO) of the higher education sector. Collective consultations with the NGO's, the last of which took place in September 1994 in Paris, are planned to be continued.

A lot of inspiring ideas are worthy of discussion. The only remaining question is, how to realize all these proposals under the conditions of permanent budget cuts. Here common talks must start.

WORLD BANK

"Higher Education -- The Lessons of Experience" was published by the World Bank in May 1994. The soft statements made in the UNESCO paper are expressed in more detail here. First of all, there is a clear definition of the role of higher education institutions as the Bank sees it: "Institutions of higher education have the main responsibility for equipping individuals with the advanced knowledge and skills required for positions of responsibility in government, business, and the professions. The institutions produce new knowledge through research, serve as conduits for the transfer, adaptation, and dissemination of knowledge generated elsewhere in the world, and support government and business with advice and consultancy services. In most countries, higher education institutions also play important social roles by forging the national identity of the country and offering a pluralistic debate." (p. 1)

It goes on to say, "Despite the clear importance of investment in higher education for economic growth and social development, the sector is in crisis throughout the world."

In similar fashion to the UNESCO paper, the analysis of the framework conditions stops here. The reasons for the drop in the share of education expenditure are not investigated, and the issue as to whether and how priority in distributing funds could be given to education and science is not discussed. Against this background, the World Bank suggests the following measures:

- A diversification of the higher education system: priority should be given to "non-university institutions" and promoting private higher education institutions;
- Mobilizing greater private funding by cost-sharing with students. Also public institutions should be allowed to establish their own tuition fees; the public subsidization of non-instructional costs like housing and meals should be sharply reduced;
- Thirty percent of the budgets should come from nongovernment sources, especially by contract research for industry or consultancy services or further education programs;
- Although the World Bank is stating, that experience with existing loan systems has been disappointing (subsidized interest rates, higher default rates, high administrative costs) the proposal is made, to establish new income-contingent loan schemes (p. 8);
- The World Bank combines the demand for a coherent policy framework with a call for decentralization of the

decision -- making processes and move towards market-oriented instruments for starting higher education development (p. 9);

- The World Bank wants the institutions responsible for advanced training and research programs to be guided by representatives from the productive sector, this should help ensure the relevance of academic programs.

The World Bank paper does not explain why and how cuts in public budgets can be compensated for by the privatization of costs during a recession. It would be more honest to state that the aim is to conduct a redistribution policy. Government-sponsored service, such as the offer to visit a higher education institution, which is funded by general tax revenue, are to be cut back, and the budgetary means are to be re-allocated to more profitable areas. The consequences are predictable. The World Bank itself says, "In countries with fragile systems of governance, students with grievances -- and there will be grievances if subsidies and privileges are reduced -- can represent a threat to political stability" (p. 4).

EDUCATION INTERNATIONAL

To analyze and to respond to these trends and policies in an adequate way requires engaged and highly motivated academics and politicians, a strong organization with creative personnel, and a budget, which allows spontaneous and long-range activities, to convince new majorities for a policy which is offering "priority to higher education and research."

The Education International had its founding congress in Stockholm in January 1993. More than 1,000 delegates came to merge the former International Federation of Free Teachers Union (IFFTU) with the former World Congress of the Teaching Profession (WCOTP) to an International Trade Secretariat with a membership of more than 250 national unions from 136 countries representing more than 18 million educational workers.

A "Sectorial Committee for Higher Education" was established, to build up a strong voice for higher education and research in and with the Education International. Among the members of this committee you will find your representative, Irwin Polishook from PSC/AFT CUNY, and Ann Shadwick from NEA. In July 1995, we will go to Harare in Zimbabwe to participate in the World Congress of EI. That is a long way, but it will be a longer way to reach adequate representation of the higher education and research sector in the new International, which is without a real alternative. It can play a significant role in the international arena.

In the following, I would like to explain what we can do and how we can do it.

STAFFING HIGHER EDUCATION

The described framework and aspects of development in higher education and research have great impact on the quality of academic work: the expansion and the movement from elite to mass and universal education, the changes in governance from more collegial to more management -- or market-oriented models, the closer links between funding and the economic health of the nation, the needs of the laboratory worker, the need for more efficiency and new methods of quality assessment, the new role of evaluation and accountability, the challenges of an endangered environment, new ethical and social responsibilities ... All this is changing the role of academic work.

A new academic mandate is required, a new balance has to be reached between teaching, scholarship, research, consultancy and other services. The changes and diversification of tasks have brought with them changes in academic structure and appointments.

Part-time and temporary full-time appointments, appointments restricted to either research or teaching are being established. The opportunities of non-tenured staff to move into permanent positions have deteriorated. Maurice Kogan, an experienced British researcher on higher education, speaks of a "growing academic underclass." The presence of these disparate groups will pose serious problems. Tensions have grown, because of widening differentials in status and rewards.

A thoughtful use of staff development plans is needed. Aging faculty underscore this demand. The working conditions of younger academics in many disciplines are no longer competitive. The reserve pool of junior staff is therefore likely to be too small and not well enough prepared. Dissatisfaction is not the mother of invention.

Against the background of this description of the staff situation at higher education institutions, whoever wants to do more than to produce short-term special programs to cover up the problems will have to get together with the academics who are affected and the unions that represent them and seek socially compatible solutions through negotiations.

To this end, we need guaranteed negotiation rights. We will only be able to give our consent to staffing decisions, if we can actively take part in them. Discussing restructuring plans for higher education institutions or preparing staffing decisions for individuals also means that trade unions will have to rethink their positions. We are ready to carry our responsibility, but at the same time, we say that we will protect ourselves against those who think they can make compromises for us.

UNESCO RECOMMENDATION

These questions arise not only at national, but also at international levels. It has taken many years to convince UNESCO to prepare a "Recommendation Concerning the Status of Higher Education Personnel." After extensive preparatory work by Don Savage, the General Secretary of the Canadian Association of University Teachers (CAUT) and intensive discussions held by the International Conference of University Teacher Organizations (ICUTO), the 27th General Conference of UNESCO approved an order for the compilation of a recommendation in May 1993. In September 1994, an initial draft was submitted. It was the object of consultations between UNESCO and EI, which took place in Paris in December 1994. In these negotiations and in talks with ILO, Educational International urged that a joint recommendation supported by UNESCO and ILO, be achieved. Just as with the recommendations for teachers in 1966, things should not be left to UNESCO to decide on its own. The national governments, i.e the public employers, are the only parties represented in UNESCO. ILO, with its tripartite structure, offers more opportunities to represent the interests of employees. Legal positions that have already been established should not be given up. We will have to reckon with a long dispute. Many governments question the right of the unions to participate and negotiate. We will only be successful if we receive public support. In this respect, I would like to call on all of you.

We must campaign for the negotiating rights of the unions in national fora and international colloquia. What is at issue is democratic, collectively agreed upon regulations of working conditions for academic staff at higher education institutions. And, therefore, the issue is also the quality of academic work that can only assume its growing responsibilities towards society, if it is given the opportunity to do so.

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INTERNATIONALIZATION OF HIGHER EDUCATION

C. ECONOMIC INTEGRATION IN THE NORTH AMERICAN REGION: IMPLICATIONS FOR HIGHER EDUCATION

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The process of economic integration in the North American region is having deep implications for education and for higher education in Mexico, Canada, and the United States. To clarify such implications, we will take advantage of a broader view. Thus, in the first part of this paper I will attempt to describe the kind of economic model or strategy which is behind the process of integration. The second part considers the North American Free Trade Agreement (NAFTA) as a key element in the economic strategy for integration and describes its links to development and education. Finally, the third part describes some consequences more directly related to higher education. Economic integration and NAFTA, are changing the nature and direction of work in higher education. From the perspectives of faculty and their unions in the three countries, this is a process of urgent analysis. This paper is only a contribution to that broader effort.

One cautionary note: the implications that we will describe here should not be read as an argument against the integration of the economies, but rather as a critique of the terms in which such a process is occurring, at least in the northern region of the American continent.

THE ECONOMICS OF INTEGRATION

In Mexico, Canada, and the United States, integration is presented as inevitably linked to one specific model of economic development. It is a model based on the unchallenged idea that economics and society could and should be separated from one another. This has not always been the case and is not the only road to the future. Previous models of development considered the welfare of the entire population as a key element of economic strategy, as a way, for example, of improving the internal market and to strengthen local industry and agriculture. Economic strategies such as the New Deal in the U.S. and the 'mixed-economy'[2] in Mexico in the thirties reflected this view.

The present model, on the contrary, is founded on the belief that the dynamism of economic development rests mainly on the free flow of capital and on the expansion of a competitive international market of products and services ruled by large transnational corporations and gigantic financial institutions.

The implicit promise of the new economics is that the removal of internal and external obstacles will bring prosperity to our societies. All of these jobs -- so goes the promise -- will make people capable of buying the goods and services necessary for their own and family welfare: health, housing, education, culture, entertainment. The old fashioned concept of social welfare to be replaced by that of individualized welfare. Well-being strictly linked to income, and ultimately determined by how and where each individual, family or group, ends up in the world competition.

A TIRED YOUNG PROMISE

The model, however, does not seem particularly successful in generating a prosperity for all. After more than a decade of experimenting with the new economics of liberalization and restriction of social spaces, the strategy cannot be considered as particularly successful for what really matters. The number of people that fall below the poverty line has suffered a clear tendency to increase in our countries;[3] there is a growing scarcity of jobs and a drastic change in the nature of employment (more temporary and part-time jobs);[4] salaries have not being able to recover their buying power from 25 years ago.[5] Finally, there is a worrisome decline of some of the leading indicators of the health and welfare of the people,[6] even in the more developed economies in our region. Worse yet, there are explicit plans to reduce public benefits and to reduce the amounts of public funds earmarked for that purpose. Thus, societies appear to be accepting the idea that they should be divided in groups with striking differences in the access to "the good life." The new economics propose a development from which many are definitely excluded.

THAT CAN ALSO BE DANGEROUSLY FRAGILE

Mexico has become an illustrative example of the fragility of this model of development. It is a case that shows what happens when for more than a decade, social covenants are broken one by one to serve this economic strategy. The crisis, generated in the political and social sphere, quickly affects the economy and then turns again to the question in what direction should the country go. A political crisis. But the economic model plays a key role in the fragility of the country, because it makes possible more now than ever that the decisions of only a few, in the political and economic circuit inside and outside the country, can literally sink the country.

The story is that to insure economic and financial stability the Mexican government invested 12 years to build up a chest of reserves in foreign currency, of about 30 billion dollars. To create this reserve, while at the same time paying the external debt service (up to 50 percent of the federal budget at one point), the government imposed a program of austerity consisting of a reduction of general salaries to 50 percent of their buying power (high inflation and minimal increases); a drastic reduction in social spending (40 percent less, as in the case of education), and the sale of most of the public industry, including the telephone company, roads, airlines, and also the bank system. These sales generated unemployment, union busting policies and a higher price on services.

At the same time, this emphasis on the creation of the niche for internationalization meant indifference, and in some cases open hostility to the basic economic structure of the country, the one that provided jobs, subsistence or some form of income to more than 90 percent of the active population. In other words, the government pretended to generate an economy based on a sophisticated international connection, but in fact sacrificed the real economy. Potentially exporting industries (which number has been estimated as low as 200 out of a total of more than 120,000) were specially favored with the lowering or elimination of tariffs by NAFTA, with loans and subsidies, and with higher education policies that seek to open the research infrastructure of the institutions, in order to change the research priorities and to reorient or create graduate programs towards this sector. Capital was attracted to high dividends (up to 20 percent with inflation running at 7 percent and annual devaluation at 3 percent), and a complete tax exemption for stock market earnings. At the same time, peasant land, the one that provides subsistence to around six million families in the countryside was put up for sale by a change in the Constitution, thus creating the basis for a future massive unemployment in the countryside. The hope was that high tech agro-industry will absorb all those displaced.

Instead of investing in strengthening and widening the existing productive basis, the government bet on this model of economic integration, i.e. the terms of the transnational corporations and of the operators of financial capital. The reserve of 30 billion was there as a symbolic and real guarantee of financial stability and buying power. The signing of NAFTA became a symbolic and real guarantee of institutionalized commitment to open the country to capital (financial and industrial) and products and services from across the borders.

However, it all came crashing down in just a few months. By the end of 1994, the reserves were down to 7 billion. The drain was caused by the silent stampede of investors and the decision of a handful of government officials, to maintain, at any cost, the parity of the currency.[7] At the same time, the NAFTA equation was working the way the critics had always said: Mexico will be exporting very little and will be importing much more than its capacity to acquire dollars.

Not yet recovered from the 12 years of austerity, workers, unemployed, peasants again have to pay a high price for the experiment of economic integration. The government increased sales tax by 50 percent, gasoline and natural gas 35 percent, agricultural prices 42 percent, and, consequently, there was a 3 percent inflation in 15 days in February 1995. With such inflation, even an increase in wages of 12 percent means a reduction in workers' buying power. At the same time, the government is announcing cuts of a proportion not yet determined in its social budget. Education and other services certainly will not be spared.

However, the most severe cost is being passed on to the economic infrastructure of the country. The strategy of neglecting for years the existing productive infrastructure results now in bankruptcies and closings. Micro, small, and middle size firms simply cannot support paying their old and new loans at 100 percent a year along with a 30 percent drop in consumer spending. If during the last administration the new economy meant a reduction in the number of manufacturing firms from 125,000 to 122,000[8] estimates of the impact of the present crisis would probably make that number drop below 100,000.[9]

The very expensive flirtation of Mexico with the harsh terms of the economic integration as they have been set by transnational and financial operators has still an additional cost. The loans that recently have been granted (initially 20 billion but more would be needed), impose an additional economic drain in dollars and humiliating conditions to the country: the Mexican government has agreed to place all deposits of oil revenues paid to Mexico by other countries in a Federal Reserve account in the U.S., so that the American government can have access should Mexico run late in its schedule of payments.

A strategy of damage control in the media seeks to pin the blame of the crisis on Mexico only,on the obvious wrongdoings of a few public figures (before hailed as heroes of the new economics), but not on the model itself. It will be out of proportion to say that what happens in Mexico will happen in the U.S. (although some Canadians think that they are not very far from this outlook). The socially divisive traits that one can see from outside (such as proposition 187 in California), may not cause armed rebellions like the one of the Zapatistas in Mexico, or the political disintegration under which we live. The conditions in the U.S. are very different and the spillover effect of the new international circuit is certainly more visible in this country, being the home-base of many of the larger transnational and financial centers. It is ironic that the cost of the initial rescue to investments made in Mexico (and to restore financial credibility and resuscitate a market that no longer buys anything from other countries) is as high as one-third of the cuts that will be taking place in the budget for social welfare in the U.S. for the next five years.[10] The cost of the entire rescue could be equal to that of the planned cuts.

HIGHER EDUCATION AND INTEGRATION

It is the responsibility of the faculty of the three countries to make an analysis of how and to what extent higher education institutions of the three countries have implicitly adopted this new economic model and gave it a clean bill of health. Going beyond the mere anecdotal (Mexico's recent presidents, as well as most cabinet members are all the result of internationalized higher education: De la Madrid, Harvard, Salinas de Gortari, Harvard, Zedillo, Yale, it is possible to propose an hypothesis that, with some exceptions, and with detailed description of complexities, higher education in the three countries has not adopted a critical view of this strategy of development but, on the contrary, is participating or actively seeking ways to participate in the educational project that comes with this type of economic integration.

Many faculty and, above all, presidents, board members, educational foundations, government officials in charge of higher education, and many corporation officials already linked to higher education are deeply convinced about the correctness of this road. There seem to be very few who do not believe in higher education as a place to develop international competitiveness through high technology, electronic highways, industry links, distance learning, service university, globalization, and excellence. Although those terms can socially have very diverse meanings, it seems that the context in which they predominantly are read and put into practice is the one set by these economics and its accompanying political and financing structures in the higher education world. Around those terms is taking place a whole restructuring of the university which provides it with new social goals. Not so much the ones of social opportunity, a place for generating and diffusing socially relevant knowledge (which requires autonomy from business and government), a place to prepare for full participation in the productive sphere of society as well as in the political and civil ones. As an institution supported by the whole society, its responsibility goes beyond the apparent needs of a buoyant or promising economic sector, into the larger picture of the needs of the entire productive infrastructure. Instead, there is a substantial advance of policies that result in the exclusion of students, the narrowing of knowledge and its commercialization; the definition of the university as a specialized provider of services. NAFTA actively promotes this future for tri-national higher education.

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)[11]

NAFTA represents the endorsement of the three governments to the previously described strategy for development. It is a supranational legal instrument which reiterates who are the beneficiaries of the new economy and, by doing so, has strong repercussions upon education.

NAFTA reiterates the principle of reducing as much as possible any restrictions or barriers to the flow of capital, goods and services through the borders of the region. In NAFTA there is a series of norms that tend to open all public spaces (including public education) to private investment or business. These norms tend to establish a clear restriction upon public competencies (including those related to education).[12]

NAFTA SPECIAL GUESTS

With reference to the opening of public spaces to private investment, take for example chapter 13 of NAFTA which regulates the use of telecommunications networks in the three countries. It establishes that:

> Each Party (government) shall ensure that persons of another Party have access to and use of any public telecommunications transport network or service, including private leased circuits, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms and conditions (Art. 1302).

Obviously, not many "persons" can have the potential to do business using the telecommunications network of another country. Only a handful of corporations -- in fact no more than 20 in the region -- can take advantage of this total opening. But that is not all. NAFTA also establishes that governments should insure that there will be a minimum charge for the use of such networks: "Each Party should ensure that the pricing of public telecommunications transport services reflects economic costs directly related to providing the service," nothing more (Ibid.). In the case of Mexico, where the infrastructure has been built mostly with public funds (from telephone lines to satellites), this means that the cost of the infrastructure and of its renewal and expansion should not be included as part of the price to corporations. However, on the other hand, the economic benefits for the users will be very important: in Mexico alone the opening of this public sector will represent for corporations business estimated at 4 billion dollars annually.[13] Although few Mexican partners (only one has announced its intention to participate) would have the potential to join in some of these ventures, this opening involves changing the Mexican constitution (Article 28) which establishes as "strategic" this area and, thus, is restricted to private investment.

This chapter also means that a few corporations will have control over most of the cultural, entertainment and educational space on the region's networks. If, for example, universities of the region decided to use these networks for educational purposes, they will have to compete and negotiate with these corporations.

Perhaps on a lesser scale, it is possible to arrive at a similar conclusion regarding the beneficiaries if we look into Chapter 10 which establishes the obligatory rules for Government Procurement of goods and services for education across the borders. Like other chapters, this one also has implications for education, for it establishes that providers of educational materials, and of any other kind of services for education from another country, should not be discriminated against.

> Each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to: (a) its own goods and suppliers; and (b) goods and suppliers of another Party (Article 1003).

This article will, in the near future, also apply to procurement of federal, state and local educational systems. But again the fact is that only a handful of firms have the experience and the capability to have access to the market of goods and services for education in the three countries. These will be hardly found in

Mexico, where a federal and centralized public educational system provided for the even for the printing and the distribution of textbooks for all elementary schools, free of charge. Beside the language barriers, Mexican firms do not have the experience of dealing with more commercially oriented educational systems and, thus, have not developed accordingly. In this, like in many other areas (communications, intellectual property, investment), NAFTA clearly works primarily in favor of the large firms, and for the more developed partners.

NAFTA AND THE SHRINKING PUBLIC SECTOR

Article 1201 discusses the public and private sectors' roles in education. On the one hand it states the 'right'(!) of the public sector (the State, governments) to provide education, but on the other hand, it establishes that such right is only valid as long as it is not carried out in a manner inconsistent with other provisions in NAFTA. In fact in Chapter 12, it is established that nothing

> can prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter (Art. 1201, b).

Furthermore, in a wider version of the same principle the Party's regulatory actions should not only adjust to the provisions of one chapter but to the whole Agreement. (A state enterprise related to education is considered a monopoly.)

> Nothing in this Agreement should be construed to prevent a Party from designating a monopoly...[but] each Party should ensure that any...governmental monopoly that it maintains or designates acts in a manner that is not inconsistent with the Party's obligations under this Agreement...(Art. 1502).

This provision clearly limits the possibilities of the public sector to directly establish new educational services, or to regulate aspects related to education. This is a way of limiting possible 'unfair' competition by the State (federal, state and local governments and public enterprises) and, thus, a way to favor private providers of educational services or supporting materials and services. In line with the same principle of fair competition, this chapter also specifies that any enterprise created by the State would have to adjust its operations to commercial criteria - a monopoly should act "solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service..." (Article 1502, 3.b).

A further reduction of the public sector resides in the fact that NAFTA includes, in chapter 20, a set of provisions to determine which is the correct interpretation of the Agreement in case of a dispute. A Free Trade Commission is established by NAFTA, and one of its powers is to determine whether the

Agreement is not being violated when a government decides, for example, to establish an educational initiative. "The parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees. The Commission shall:

a) supervise the implementation of this Agreement...
b) resolve disputes that may arise regarding its interpretation or application..."(Art. 2001).

Furthermore, in the case of investments that enter in some conflict with state monopolies, a firm or individual's claim can lead to an arbitration procedure between the investor and the country allegedly at fault. In fact, in Section B of Chapter Eleven that deals with the "Settlement of Disputes between a Party and an Investor of Another Party" it is established that "an investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation" (Article 1116), to an international tribunal. The importance of this can be exemplified with the case of expropriation. In NAFTA, the right of the State to expropriate or nationalize private interests is accepted and delimited, but more importantly, is something that from now on falls under the supervision of the Free Trade Commission (Art. 1110). Finally, one has to point to the fact that in spite of its importance, this Commission is in no way subject to any direct public scrutiny. Commission members are not selected by a democratic procedure. In some ways, it resembles a supranational government, yet it is not subject to the traditional parameters of democratic election and supervision.

THE COMMERCIALIZATION OF KNOWLEDGE

Three more chapters of NAFTA directly foster the commercialization of knowledge.

The first, chapter 12, regulates the cross border trade in services. In summary, this chapter establishes that educational services (degrees or courses) or services related to education (security, cleaning, food, etc.) can be provided across the borders with only a few vague restrictions. Providers are to receive national treatment, but do not need to have an office in the country where they offer or deliver their services. "No Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident in its territory as a condition for the cross border provision of a service" (Article 1205). The flow of educational services has been mostly from the U.S. to Mexico, Harvard, Stanford, the University of Texas, Yale, and the University of Pennsylvania, are some of the institutions that offer courses and diplomas in Mexico, in association with private institutions. U.S. private educational firms also offer all kind of training and educational services, including one whose advertisement claims "we have the President's men: Robert Reich, and Henry Cisneros in lectures by satellite." In terms of degrees, the University of the Pacific from California offers in Mexico a master or doctoral degree for $5,000 with monthly tutoring by fax and translation into English -- at an additional cost -- of the 100 pages required for the degree.

The second one is Chapter 11 which regulates investments across the borders, including those related to education. A summary of what NAFTA establishes here can be found in Article 1102.2: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

Business intervention in education by the way of investments is clearly favored by NAFTA. In fact, the free flow of investments across the border is a strong priority for NAFTA. For example, a country cannot impose a "minimum level of equity in an enterprise in the territory of the Party be held by its nationals" (Article 1102.4.a). There are many exceptions to this in the case of Mexico. Furthermore, NAFTA states that "in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory," a country cannot "impose or enforce any of the following requirements: a) to export a given level or percentage of goods and services; b) to achieve a given level or percentage of domestic content; c) to purchase, use or accord a preference to goods produced or services provided in its territory; d) to transfer technology, a production process or other proprietary knowledge to a person in its territory..." (Article 1106).

Finally, NAFTA precludes the possibility that a country may impose a restriction to the transfers of money, for example, to protect its currency from devaluation: "Each Party shall permit all transfers relating to an investment of an investor... to be made freely and without delay. Such transfers include: a) profits, dividends, interest, capital gains, royalty payments, management fees... b) proceeds from the sale of all or any part of the investment..." etc. (Article 1109). Before continuing it seems appropriate to show here how this chapter impacts education in Mexico.

INVESTMENT IN EDUCATION, THE CASE OF MEXICO

The Mexican investment law of 1973 states that foreign investment is permitted only upon fulfillment of a series of exacting requisites or criteria, 17 to be precise. These criteria sought to protect the national productive infrastructure ("[foreign] investment... should not displace national firms..."), provide employment and training, contribute to technological modernization, and, among others, "contribute to preserve social and cultural values of the country."[14] In the logic of this article, it is clear why education was not included as a possible field open for investment by foreigners.

It is also clear why the law was in the way to the model of development sought by NAFTA. This legislation was considered as a barrier to free trade and to the flow of capital, and therefore, it was argued, it had to be changed. Thus, only four days before the beginning of NAFTA, on Dec.. 27, 1993, a new law was hurriedly approved.[15] It substantially reduced the limitations upon foreign investment (the number of criteria dropped from 17 to 4) and, for the first time ever, foreign investment became possible in the area of education. So, unlike mail services, railroads and the oil industry, education is not excluded from foreign investment. Furthermore, unlike cooperatives and air taxi services (which can only accept 10 percent and 25 percent foreign investment respectively) educational services can have up to 100 percent of non-national investment. According to the new law, the private services of preschool education, elementary and secondary school, post-secondary school and higher education or any combination of the above are now open for investment. (Art. 8). All cases of foreign investment above 49 percent need the approval of the National Commission on Foreign Investment. This entity, however, has very little room to deny anything since the same law instructs the Commission to only impose requirements that do not represent a distortion to international commerce (Art. 29). (It is hard to think of one requirement that, when enforced, cannot be interpreted as a 'distortion to international commerce).'

INTELLECTUAL PROPERTY

In Chapter 17, NAFTA become one of the strictest instruments in the world for the protection of intellectual property.[16] Article 1701 states: "Each Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights..." NAFTA includes this chapter, which was not part of the Free Trade Agreement between Canada and the U.S. and it is considered as one of the stricter protection instruments on intellectual property.[17] In order to offer such protection, NAFTA clearly mandates that each country establish legislation, whose contents are described explicitly and at great length in this chapter, to prevent and punish such infringements:

> Each Party shall ensure that enforcement procedures...are available under its domestic law as to permit effective action to be taken against an act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies to deter further infringements (Article 1714).

It instructs the Party, for example, that such legislation specify that "goods that they have found to be infringing be...destroyed" (Art. 1715.5). It mandates that each Party shall provide that penalties available include imprisonment or monetary fines, or both..." (Article 1717.1). Also, that authorities of the other Party take action at the border if an intellectual property holder has a valid suspicion that his/her right is about to be violated.

> Each Party shall...adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of

> counterfeit trademark goods or pirated copyright goods may take place, to lodge an application in writing with its competent authorities for the suspension by the customs administration of the release of such goods into free circulation.

Although this array of protective measures will benefit some individuals or small firms that are right holders, NAFTA's intention is clearly defined by the process of concentration of rights over knowledge. It has been estimated that around 400 corporations concentrate 90 percent of the active patents existing world-wide.[18] Their potential to generate and secure their rights over knowledge can be understood if one considers that only AT&T has more scientists (25 thousand) in its ranks than those in the whole country of Mexico (public and private: 22,600).[19] No wonder, for example, 95 percent of Mexican patents are owned by foreigners.

Mexico is also a good example of how the outright protection of intellectual property changes the role of knowledge in the development of that country. For many years Mexican laws on intellectual property established that no patents will be issued on animal species, plant varieties, microorganisms, fertilizers, bio-technological and genetic processes, alloys, pharmaceuticals, medicines, chemistry products, food for human or animal consumption and nuclear inventions. All these areas were considered part of the public domain. The law also stated that in the event that a patent conflicted with the interest of public welfare, it could be expropriated.

These regulations expressed the will of the Mexican State to favor local industry and also to slow down the rising costs of medicine, fertilizers, and other products which were essential for national systems such as health, land reform and others. However, the recent government's decision to join NAFTA made this legislation irrelevant. The expansion of investments required a clear Mexican endorsement of the property rights over knowledge. Thus, in 1991 the law suffered major changes. In its new version, all previous restrictions were removed and it is now possible to issue patents that deal directly with previously restricted areas: plants, microorganisms, bio-technology, pharmaceuticals, medicines, food for human and animal consumption, fertilizers and alloys. Eliminated was the article on expropriation based on the public interest.

In a country like Mexico where research is basically an activity of the public sector, this change will reorient the work of research centers for years to come. Of the 2,100 plus research centers, private industry has only 55, the rest are part of the public universities (880), state enterprises (732) or the federal and state governments (411).[20] Private universities have 97 centers and private foundations only a handful. In other words, specialized knowledge in Mexico was mostly produced with the support of public funds, in public centers and, at least formally, for the public interest. This structure of the production of knowledge was in harmony with the regime of intellectual property which emphasized the non-commercial character of knowledge, its public domain, and free access for all.

Although this view had been challenged since the beginning of the eighties, NAFTA meant a definitive rejection of the prior proposals and the strengthening of the commercial logic in the production of knowledge. Research centers and universities are now opening the practices of knowledge directly related to the commercial circuit, as part of the discourse of educational modernization. One example can be illustrative. The Parker Hannifin Corporation (hydraulic controls for automatized manufacturing, parts for military airplanes) through a Mexican subsidiary entered into an agreement with the Autonomous Metropolitan University, the public higher education institution of Mexico City. As a result of the agreement, the university provides space for a training and research center within one of its campus facilities (half the floor of a classroom building). It also provides faculty time for teaching and research at the center, maintenance, infrastructure, and the name and prestige of one of the leading public universities of the country for advertisement of the center activities. The center offers training courses exclusively on the Parker's technology for technicians and students from Mexico and Latin America.[21] But for all this, the university does not receive any compensation, not even overhead costs. On the contrary, students and faculty of the university who wish to take a course at the center have to pay the equivalent of 800 dollars (prior to the devaluation). In conclusion, the new approach to the generation and diffusion of knowledge frequently means an important subsidy of public funds to the benefit of transnational corporations.

NAFTA's IMPACT ON HIGHER EDUCATION

In this third part, we will identify some consequences that NAFTA brings to higher education in our three countries.

1. The first one is precisely this pressure to enter into the race for the commercialization of knowledge. Many institutions in Mexico and elsewhere will feel that is their mission to follow the lead already being established by some private and public institutions within the U.S. In the three countries, fiscal pressures are presented as an argument to stimulate this trend. The move towards assuming a commercial role is further promoted by the way the use of telecommunications is being linked to the marketing of the talents and resources of the universities. In fact, it is seen as a key element for the creation of a regional market of knowledge as a commodity. NAFTA also makes possible, and even necessary, as we will see, a stronger flow of students to those institutions that are better or have a better packaging of prestige and qualifications. NAFTA will, in summary, strengthen the trends that are turning universities or parts of the universities into malls of knowledge and services, but at a regional level.

This in turn will contribute to a deeper differentiation of higher education institutions and departments within the institutions. Those universities that gain their membership in the international circuit will attract more students and funds. But higher education institutions that still see themselves as that part of the society in charge of generating social opportunities, or that are committed to social knowledge, will tend to be further penalized. The concepts of 'quality' and 'excellence' become more and more linked to the new uses of the university in the economic integration. This means that for faculty in institutions in the regional market practice, the idea of higher education as a place for social knowledge is downgraded as a non-functional part of the learning structure.

2. A second consequence is the tendency to homologize the professions across the borders. In its Chapter 12, NAFTA instructs each country to encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers" (Annex 1210.5, Section A.2). This means that the professional organizations of the three countries should convene and agree on which education, examinations, experience, code of conduct, recertification, scope of practice, requirements of local knowledge, and mechanism for consumer protection can be mutually acceptable.

This involves the question of whether for the region there should be a single definition of what constitutes a profession. This mandate from NAFTA is forcing a condensing into one of at least three different definitions of profession that already exist. As is well known, a profession is made up of a history of practices, knowledge and skills that respond to the peculiar conditions existing in each social context. Each of the three countries involved in NAFTA probably has a different definition in most of the professions. The definition of the profession of medicine, to give one example, is very different in Mexico than in the U.S. In Mexico, to be a doctor means to train in one of the three public health systems organized by the State, it means to learn at a public university from faculty who were trained in one of those systems, and it means to eventually combine private practice with a position in one of the same public systems. Such systems, on the other hand, emerged because Mexico has a strong Indian population and a population that is mostly rural or urban poor, as well as an important sector of workers and employees whose health was important to the State to protect directly. But also, the list of the most common illnesses is very different from that of a developed country. In trying to agree upon one set of standards, the attempt is made to put in one many definitions. And most likely the pre-eminent definition will be the one that better reflects the culture of professions that is implicit in the present economic integration: mostly privatized, market oriented professionals.

Not long ago, the head of the U.S. Information Agency, Mr. Duffey stated, "...economic integration without a deepening of our educational and cultural dimensions poses an unacceptable risk: a collision of values that could well lead to more discord than we would have had without NAFTA"[22] and later on, in Mexico, he proposed the creation of a "North American" culture that will parallel the exchange of commodities.[23] He was right in singling out the problem, but not so right in his solution. In spite of the repetitive declarations regarding the diversity of cultures, there is a strong tendency to homogenization imbedded in the manner in which the regulations to the Agreement are evolving. An economic integration that seeks to be based upon one homogeneous culture can very easily slip into an hegemony.

3. A third consequence is that NAFTA encourages the establishment of some form of single system of higher education for the region, and, consequently, a single transnational coordinating body. NAFTA hints at something like this when it states that the professional association's agreements on the recognition of certain professions will be "recommendations" to be ultimately approved by the Free Trade Commission. This means that the Commission will have the authority to declare which professions are recognized as mutually acceptable for services across the border (Annex 1210.5, Section A.2). But the idea of one supranational body coordinating higher education in the three countries was more clearly put forward by Mr. Duffey when he expressed that, "the economic futures of Canada, Mexico, and the United States depend on how well academics cooperate to develop a North American system of higher education." He added that "business and financial institutions in our three nations have already moved to open the door to trilateral partnership. We must foster the same intensity and dynamics of North American interaction in higher education".[24]

More important than the declarations is the fact that steps have been taken to create an entity for the running of higher education in the three countries, or as stated, "the development of a North American dimension of higher education." The conferences of Wingspread, in Wisconsin, U.S. (1992) and its follow-up in Vancouver, in British Columbia, Canada (1994) have already marched a long way in this direction. Wingspread creates a set of directions for higher education in the region. For example, it sets internationalization as the criteria for quality: "internationalization of higher education is the key to quality in education and research."[25] It specifies what knowledge should be given priority: "all those disciplines directly related to the management of our commercial relations now in progress..." It also makes recommendations pertaining to the day-to-day administration of institutions in the three countries. For example, institutions in the three countries should "increase [their] efficiency...with special emphasis upon the development of faculty in the three countries." It also points to the direction of creating a regional market for higher education: one objective is to "facilitate the mobility of students and faculty," "to increase initiatives to increase and expand the access of students to the international opportunities of education," and also to "take advantage of management information and...technologies such as distance learning, interactive video, etc."

However, the most important conclusion of Wingspread (and Vancouver) is the answer to the implicit question of who, specifically, should be in charge of the initiative for a North American system or coordination of higher education. The answer given in Wingspread, and abundantly reiterated in Vancouver, is that tri-national higher education would be better served, if conducted by three parties: corporations (directly or through their educational associations), governments, and higher education officials. The presence of Northern Telecom from Canada, Grupo Condumex of Mexico and the American Council on Education from the U.S. as members of the Wingspread Task Force represents, as the Wingspread declaration states, "the first time in which representatives of the public and private sector converge to jointly draw a concrete plan for trilateral action [in higher education]."[26] Once the conduct has been established in these terms, it means that the future steps (like financing) will tend not only to be guided by the perspective of the present economic model of integration, but also from the specific perspective of these social actors. For higher education tri-national integration means a step forward in the integration of higher education into the vision and direct influence of corporations and NAFTA governments.

It is highly symbolic of the nature of this process of economic integration that none of the 50 participants at Wingspread represented the faculty unions. A year later, in Vancouver, and with 270 participants, there was only one union representative listed. Of course, he was not chosen as a member of the Task Force, nor of the Steering Committee. According to the press reports, our de facto representative, Professor Alan Andrews of the Canadian Association of University Teachers, was very outspoken and active. Among other things, he challenged the Mexican officials on whether they were speaking for the Mexican faculty. But he was very much outnumbered. It is naive to think that the perspective under which economic and higher education integration is occurring grants an important role to unions and faculty. It is naive to think that this path will not impact greatly upon our conditions of work.

In fact, NAFTA, if anything, is above all a threat to the participation that we, as faculty and citizens, have created in the last sixty years. We are now going towards societies in which an ethereal and inaccessible segment of society, in fact, controls the destiny of our institutions. NAFTA is a binding instrument and, as such, it commits governments to defend and foster the interests of transnational and financial centers. As a result, governments gain an important degree of autonomy regarding their citizens. This was eloquently expressed by a member of the conservative Fraser Institute, referring to NAFTA. "A trade deal simply limits the extent to which the U.S. or other signatory governments may respond to pressure from their citizens."[27]

ENDNOTES

1. Departamento de Educaciún y Comunicaciún. Universidad Autúnoma Metropolitana-Xochimilco. Mexico, D.F.,

2. 'Mixed economy' is a term used to describe the Mexican strategy (approx. 1930-1985) where the State and the private sector participated fully in the economy, under the state control.

3. In the U.S., the number of people in poverty has increased at least 30 percent in the last five years, from 31 million to 40 million (1989-1993). ("The GOP's Blind Faith in Charity" BUSINESS WEEK, March 6, 1995. Page 65). Of those, 13 million are children. In Canada there also has been an increase in the number of poor. Presently, of a total population of 27 million, 5 million live in poverty and 40 percent of them are children (Ontario Coalition Against Poverty /National Antipoverty Organization). The income distribution in Canada is such that 20 percent of the population holds 70 percent of the wealth, while 80 percent of the population holds 30 percent of the wealth (Statistics Canada 5/13/88). In the U.S., 20 percent of the population holds 80 percent of the wealth of the country in a situation that has been worsening since the 70s (The New York Times, April 17, 1995). In Mexico, about half of the population (40 million out of approximatly 80 million) is considered "poor". After an anti-poverty program recommended by the World Bank and implemented in the last six years, the figures changed substantially.

4. In the three countries the general trend of unemployment levels appears to have increased in 1982-83, decreased somewhat in the following years but without ever reaching the levels of the 70s, and it appears to be climbing again at the beginning of the 90s. This is particularly clear in the case of the U.S. If in 1978 there were 6.2 million unemployed, in 1991 the number was 8.4 million, although this number has come down from that of 1982-83 when there were 10 million unemployed and from 1989 when there were 6.5 million (Anuario de EstadÆsticas del Trabajo, OIT, 1989, 1992, Page 629/606). In the other hand, the percentages of unemployment in 1970 in the U.S. (3.3 percent) does not appear again ever (1991:5.5 percent) (Statistical Abstract of the United States, 1994). In Canada, in 1978, the percentage was 8.3, in 1991 it was 10.3, with .9 and 1.4 million unemployed, respectively (Anuario de EstadÆsticas del Trabajo, OIT, 1989, 1992, Page 400/602). In the case of Mexico, the figures have been around 5-10 in the last ten years, but they had been consistently set at 30 percent, if informal economic activities are not considered as employment.

5. In 1965 in the U.S., the average salary (non-agricultural) was $14,544 in 1982-84. In 1990, it was $11,972 (Elaborated by the author based on: Handbook of Labor Statistics, Dept.of Labor, U.S.A. 1989, Pgs. 320-322 and 475). In Mexico, it is reported that the buying power of the minimum wage fell 58% and 30% that of the medium salary during the last 12 years (LA JORNADA, 19 April, 1995, Page. 45). In 1965, the average salary of an elementary school teacher (similar to that of a skilled worker and of a lower level employee) was equivalent

to 1,400 pesos in 1970. In 1990, it was around 800 pesos in 1970 (Aboites, Hugo: "El Salario del Educador en Mexico:1925-1982" Coyoacçn, No. 16, 1984. Pages 69-95).

6. In the last years, there has been an acute increase of diseases that are known as "the diseases of poverty." In the most developed of the three countries, the U.S., for example, data of 1992 shows increments with respect to 1970: in Leprosy (33 percent), Salmonellosis (85 percent), Shigellosis (74 percent) Typhoid fever (19.6 percent) Syphilis (24.5 percent). There are also increments in tuberculosis (19.1 percent) and, from 1988 on, increments in tick and flea borne typhus fever (32 percent). In 1992, in the U.S, only half (55.3 percent) of the children were fully immunized against polio and other diseases (DPT-polio-MMR) (Statistical Abstract of the United States, 1994. Tables 203 and 204). Canada and Mexico show higher rates of immunization (85 percent and around 75 percent respectively) (Anuario EstadÆstico UNICEF, 1993, Page 75).

7. Besides personal motivations, the logic of the decision was to hold on in order to avoid a worsening of capital flight.

8. From 1985 to 1991, the period of austerity but not yet of internationalization of the economy, the number of manufacturing firms in Mexico increased from 84,902 to 125,765. But by 1994, the high point of the new economy, it had diminished to 122,214. This change has been attributed to "the economic deceleration that started in 1992 and to the increased competition generated by the elimination of barriers to commerce and imports, as well as to the changes in regulations." Of the closings, 97.3 percent were micro and small manufacturers. (Chavez, Marcos: En Jaque el Sector Manufacturero en el Salinato EL FINANCIERO, 5 April, 1995. Page 26).

9. The number of manufacturing firms could very well go under 100,000: estimates of the effects of the present crisis in Mexico are a reduction between 25 and 35 percent in their number. Speaking not only of manufacturers, a commission of the Mexican Congress warns that "2 million micro, small and middle size firms that provide jobs for 10 million are in danger" due to financial crisis. (Camacho, Oscar:"Comenzù ya el colapso del sector: Comisiùn de Fomento Industrial" LA JORNADA, 15 April, 1995).

10. The estimated cuts will be of 60-80 billion, the initial loan is set at 20 billion. "The GOP's Blind Faith in Charity" BUSINESS WEEK, March 6, 1995. Page 65. The price of these loans, which for the most part are going directly to Wall Street investing firms, will be paid initially by the American taxpayer. As in the case of the S&L problem the taxpayer will be asked to pay for the rescue of financial institutions that end up in problems. The only difference is that now he/she has to pay for the rescue of investments in trouble also in other countries. Globalization has more risks and the insurance has to be paid by the taxpayers. However, the higher price of this rescue to capital will be eventually paid by the taxpayer and the poor in Mexico, with the usual doses of redundant payment that occur in these cases.

11. For this approach to NAFTA see: Calvert, John & Kuehn, Larry: PANDORA'S BOX. Canada, Ourschools/Ourselves, 1993.

12. These are the leading principles of NAFTA, but the Agreement contains many exceptions and limitations to these principles. Thus, NAFTA typically states the principles in the articles of the chapters, but then in Annexes these principles may appear somewhat limited.

13. In one of the projects which will generate such huge business, Hughes Corp., will have 51 percent of the stock, while some Latin American corporations and HBO will have the rest. (Cardoso, Victor "Telecomunicaciùn por satÄlite, nuevo paraÆso" LA JORNADA, Mexico, D.F., 6 de Marzo, 1995. Page.48). AT&T and IBM have the second and third place respectively in the world communication business, but they appear to be in close competition with Japanese firms who control most of the 10 leading positions of the world market (NTT with 50 billion dollars income, Matsushita, Sony, NEC, Fujitsu, Hitachi, Toshiba, are among the top ten). With NAFTA, AT&T obtains a less restricted access to an important market of the world, and, most importantly, creates a barrier against competition from outside this commercial block. Corporations such as GTE, Bell South, Motorola, Hewlett Packard, Dec, Nynex, Bell Atlantic, MCI, Ameritech and Sprint are in positions located between 12 and 25. ("De EU y Japùn, 19 de los 25 'gigantes' en informçtica" EL FINANCIERO, 11 de April, 1995. Page. 12).

14. "Ley Para Promover la Inversiùn Mexicana y Regular la Inversiùn Extranjera" Mexico, H. Congreso de la Union, 1973. Art.13.

15. The law took effect the 28 of December 1993, NAFTA on January I, 1994.

16. "Intellectual Property" is a category that in NAFTA includes copyrights, encrypted program-carrying satellite signals, trademarks, patents, layout designs of semi-conductor integrated circuits, trade secrets, geographical indications, industrial designs, sound recordings.

17. One of the most powerful groups lobbying for stricter regulations regarding intellectual property is the Intellectual Property Committee (IPC) its members are: Squibb, DuPont, General Electric, Hewlett Packard, IBM, Johnson & Johnson, Pfizer, Procter & Gamble, and Time Warner. The IPC was actively behind NAFTA (Victor Manuel: "Propiedad Intelectual" in: Arroyo et al.:TRATADO DE LIBRE COMERCIO DE AMERICA DEL NORTE. Ançlisis, CrÆtica y Propuesta. Mexico, Red Mexicana de Acciùn Frente al Libre Comercio, 1993. Page 235ss.)

18. Testimony of Dr. Carlos GarcÆa Moreno in the Panel "Constitucionalidad y TLC", Universidad del Valle de Mexico, 27 de Sept. 1993. He is a member of the Hague International Arbitration Court in Holland. "Only one percent of patents are property of nationals of Third World Countries. Of 3.5 million patent in the world in the 70s, only around 200,000 were for developing countries. The greater part of those patents in the Third World were the property

of foreigners, essentially transnational corportations of the five richer countries" ("Of Minds and Markets: Intellectual Property Rights and the Poor" in: Rongead, GATT BRIEFIN. ON TRIPs. No. 2, July 1990. Page 2, quoted by Heredia, Op.Cit. pp. 233-234)

19. Guadarrama, JosÄ:"En manos de trasnacionales, la 'materia gris' para la investigaciùn cibernÄtica" EL FINANCIERO, 11 April, 1995. Page 12.

20. Aboites, H.: "Internacionalizaciùn de la Educaciùn Superior: los probables beneficiarios en el marco de la integraciùn econùmica" EL COTIDIANO, #52, Enero-Febrero, 1993. Page 85.

21. In one case at least, some of those students were supported by scholarship programs of the Interamerican Development Bank.

22. "Learning the key to NAFTA success" THE VANCOUVER SUN, Vancouver, Canada, Sept.13, 1993.

23. "In Search for a North American Identity" Mr. Joseph Duffey Speech at the MatÆas Romero Institute. Ministery of Foreign Relations, Mexico. 21 Oct. 1993.

24. "Learning the key to NAFTA success"...

25. "Proceedings of the Wingspread Conference on North American Higher Education Cooperation: Identifying the Agenda." The Johnson Foundation, Wingspread Center, Racine, Wisconsin, U.S.A., Sept. 1992. The source is the same for all the quotations in this paragraph. Quotations are translated into English from available text in Spanish.

26. "Proceedings of the Wingspread Conference..." Presentation.

27. Quoted by Calvert, John & Kuehn, Larry: Op. Cit. Page 158.

II. HIGH TECHNOLOGY AND DISTANCE LEARNING

A. The Revolution is Being Televised: Distance Education and the University of Maine System

HIGH TECHNOLOGY AND DISTANCE LEARNING

A. THE REVOLUTION IS BEING TELEVISED: DISTANCE EDUCATION AND THE UNIVERSITY OF MAINE SYSTEM

Samuel J. D'Amico, Associate Vice Chancellor
Human Resources, University of Maine System

A little over twenty years ago the poet-musician Gil Scott-Heron wrote and recited *The Revolution Will Not Be Televised*, a song whose title and refrain were frequently heard on the airwaves. While his work constituted a commentary about that decade's potential social upheavals, like most of us I doubt he could have anticipated that today's higher education revolution is being televised.

Those individuals in the vanguard of this revolution believe that a defining moment in history is taking place "altering all aspects of society by simply allowing us to use telecommunications to move images rather than moving people."[1] The consequence of this revolution is that our ways of learning, working and living will be fundamentally changed by the extraordinary developments in technology and telecommunications.

If there is any doubt that change is upon us, one need only turn to *The Chronicle of Higher Education* and peruse its regular feature area on Information Technology. Or read the articles that are appearing with increasing frequency throughout that journal regarding the variety of technological advances in support of education. Or pick up a copy of *Syllabus* magazine, subtitled on the cover Technology for Education, and find out about the latest techniques of using the Internet as an interactive teaching tool or specialized software for scientific visualization. The mail for the past two or three years regularly contains offerings from institutions of higher education, and a variety of other groups, advertising yet another distance learning opportunity of either the credit or the non-credit variety.

THE FUTURE LIES AHEAD[2]

Since World War II, public policy makers and educational leaders have identified three major education issues which need to be addressed: access, quality and productivity. The solutions for the twenty-first century will require massive change for our educational institutions.

With regard to access, the demographics of American society have changed dramatically in the past fifty years and have posed serious challenges to our schools. For example, 20 percent of children are poor, 15 percent will be physically disabled, 60 percent will come from homes where the mother has a full-time job outside the home, 20 percent will come from homes where a language other than English is spoken, and 50 percent will be children of color. Because information is so broadly based and the acquisition of knowledge so complex today, there exists the need for new ways of teaching and learning, if students of such great diversity are truly to be engaged in the learning process.

In the past, quality has been seen as being antithetical to providing access. Real quality was defined by institutional selectivity and the students supposedly sorted on the basis of ability. This is perhaps an outmoded concept. We can no longer afford to allow students to fail in their educational experiences for it would insure economic failure and risk our collective future.

In the past education has been labor intensive with no apparent alternative. The costs have risen regardless of the efforts which educational institutions have mounted to meet the changing needs of society. There seemingly have been no ways to achieve productivity gains and the re-engineering of the educational enterprise has not occurred.

But now it appears possible to address these issues with some of the same tools that have been used in transforming American business and industry: powerful personal computers and pervasive telecommunications technologies.

The needs and possibilities are enormous. For those concerned with job loss consider the following. There are estimates that we will need to double the number of students in post secondary education from the current 16 million to 32 million in order to prepare the American work force for the future. Then ponder the following:

> By the year 2000 the University of California, the state's public research university system, will be unable to accommodate 45,000 qualified students. California State University (CSU), which provides more career-oriented education, would have to build one 15,000 student campus every year for ten years to meet its demand. It plans only to open one campus this year.
>
> California Community Colleges also need an infusion of some $5 billion to keep going. Instead, the 107 campuses expect budget cuts. Even K-12 is in serious trouble with enrollment expected to increase by 1 million by the year 2000 - with no additional funding in sight.[3]

Futurists have pointed out the last two major areas of American society that have retained labor-intensive work forces and mammoth physical infrastructures are the military and education. Less than a decade ago, it would have been inconceivable that the military would undergo the fundamental change that has taken place in the last five years. But the military work force has been drastically reduced and facilities are being closed at an unprecedented rate. Education is the last frontier for what could be dramatic change.

And since this is about Maine, how many of you have heard of L.L. Bean? How many of you have bought anything from them? How many of you have been to Freeport, Maine? The state's premier business L.L. Bean is a place, but 85 percent of its customers each year do not go there. Bean's provides services wherever the customer wants them. Less than thirty years ago Bean's was a $3 million business. Today, it is a $750 million operation. Technology and telecommunications facilitated that growth. If Bean's had not embraced technology it surely would have remained modest and relatively unknown. Still, the L.L. Bean store has not dis-appeared, that original location has grown and thrived. In education should we not remember we are in the education business and not in the campus business? Any prolonged debate about protecting campuses from the competition that is surely coming can only damage education and means that perhaps we have forgotten our basic mission.

Education is learning, but it does not happen precisely at some particular location. Technology allows us to provide learning opportunities in totally new ways. In the educational world of the future, there will be a broad range of academic and student services provided when and where the student wants them.

Campuses will not be replaced, our existing campuses will continue to serve those students they have traditionally served. The real issue is how do we serve the millions of learners -- new and continuing -- that existing campuses cannot serve.

WHY MAINE?

Think about the fact that a drive to New York City from Portland, Maine is shorter in miles by at least 10 and in time by at least forty-five minutes, than the drive from Portland to the University of Maine at Fort Kent. Or that there is no scheduled air service from Portland, or anywhere else, to anywhere near the University of Maine System campuses in Fort Kent, Machias or Farmington. Remember that this is a place where, in the bucolic setting of the scenic islands of Vacationland, many families must still make the heart wrenching decision whether to send their high-school age children away to board on the mainland during the school year or whether to uproot the entire family from their home on the island and resettle on the mainland. Our geography -- the largest state east of the Mississippi, relatively sparse population -- approximately 1.2 million, the distances and difficulty of travel have helped create impediments for Maine citizens interested in obtaining higher education.

It was no accident that in 1986, the University of Maine System Board of Trustees approved a plan to establish a statewide telecommunications network as part of a strategy to expand the community college concept and to enhance access to higher education for all Maine people. Today the Education Network of Maine (EdNet) exists as a separate entity within the University System. EdNet now serves approximately 3,000 students at 101 locations each semester, with a range of 70 credit courses leading to five associate degrees and Masters degrees in Industrial Technology and in Library Science. The latter imported by satellite from the University of South Carolina. Several new baccalaureate and graduate degree programs are scheduled to begin next fall.[4]

EdNet is the statewide distance education system using fiber optics, cable, and microwave and satellite technology to deliver credit and non-credit programming to students and others at the System campuses and centers, Maine Technical Colleges, high schools, and government and corporate receive sites.

EdNet serves students of all ages statewide, but a majority are women over 30 who live in rural areas. Many are too far from a System campus to make travel practical, especially in the winter. Distance learners may work full-time and may have small children. Some are disabled. Whatever the reason, they have not come to higher education in the past.

The University System's interactive television system (ITV) was designed and built by the Maine Public Broadcasting System in 1988. A four-channel audio, video and data fiber optic spine, leased from New England Telephone, connects electronic classrooms located at each of the University of Maine System campuses. At each of these seven campuses, the classroom signal is broadcast via ITFS (Instructional Television Fixed Service) from one transmitter to multiple receive antennae at the various receive sites. The signal can be transmitted from each campus throughout its own geographic region or throughout the entire state. Courses are offered to students over the Network from 7:00 a.m. until 10:00 p.m. on weekdays and from 7:00 a.m. until noon on Saturdays.

Students in remote ITV classrooms are taught by a professor who is simultaneously teaching to a classroom of students on campus. The instructor and any visual images are transmitted to the remote sites where the students can see and hear the instructor on television monitors. An audio talk-back system permits students in these distant locations to interact with the instructor and with other students.

Interactive television is the primary medium of course delivery on EdNet, but supporting technologies provide students and faculty with additional opportunities to communicate, both in and outside of class. Computer conferencing, for example, allows students and faculty to correspond regardless of time and distance. Audio conferencing brings guests from anywhere in the world into the college classroom. Voice mail, fax notes, and electronic mail all help to expand the diversity and range of communication available to students.

Materials are distributed to students and faculty through the Office of Information and Learning Systems. All course materials, including syllabi, handouts, quizzes and exams are sent to this central office for copying, collating and dissemination to all locations. Classes are videotaped and can be viewed at a later time should a student miss a class or wish to review before an exam.

Students at University campuses, and at all off-campus centers and sites, have access to URSUS the University's computerized public access library catalog. This database lists the book holdings, periodicals and state and federal documents of the University of Maine System. URSUS also contains collections of the Maine State Library and the Law and Legislative Reference Library at the State House and allows students to search the collections of Colby, Bates, and Bowdoin Colleges and other on-line University libraries across the country. Journal articles may be searched through CARL, the Colorado Alliance of Research Libraries or through INFOTRAC, which includes an expanded index of academic, business and health journals. Students may order materials from their computer terminal and have them sent directly to a specified location.

Even the strongest proponents recognize that no technology is perfect and interactive television fails at times. If students prefer instruction in person, they can attend classes at a campus location. What is important is that the educational opportunity is available. EdNet courses are exactly the same as those taught at System campuses. They are regularly offered courses taught simultaneously to on campus students and to distant learners. Faculty have the same responsibility for assuring the quality of education for off-campus students as for those in the classroom.

COLLECTIVE BARGAINING?

Am I going to provide solutions regarding even the few issues mentioned in the conference brochure? I wish that was the case, that there were easy answers to the issues arising from the implementation of a fairly comprehensive distance learning program. There are not. But let me emphasize what distance learning in our System is not.

It is not about rebroadcasting previously delivered lectures and courses. The tapes of instruction are available during the semester for student review, but revert to the faculty member at the end of the semester and are usually recycled. This program was never envisioned as a canned product à la the 1960's to be repeated ad nauseum.

A wide variety of faculty from the seven campuses have volunteered their talents to this new technology. No faculty are required to teach on EdNet, they are either volunteers or were hired with the specific understanding in the advertising and in the letter of appointment that they would be involved in distance education. This was memorialized in the collective bargaining agreement dealing with ITV in 1989 and provided an easy solution. The program did not want persons teaching who had no interest in being there. The University has consistently stated that although the delivery system is different, the product derived is simply one aspect of workload. It is a product not any different than the product of a faculty member with a research or public service commitment.

While some faculty have fled in horror after teaching a single course, others cannot be dragged away after five years on the network. It takes a particular combination of attributes to achieve status as more than a talking head. The secret to the success of distance learning appears to be committed faculty. The personal touch varies among faculty members. Some meet every student in person every semester, while others are unable or unwilling to do this. Nevertheless, it has not dampened the students' enthusiasm for the program since they communicate, during class and after, through telephone and electronic hookups. At a recent Board of Trustee meeting, EdNet students stated they had received more assistance and had more contact with their instructors than they had ever obtained when they were traditional campus based students.

The current operative language in the expired collective bargaining agreement between the System and its faculty is fairly brief and reflects the most salient issues that had arisen to that point:

> Workload
>
> 7. Unit members will not be required to teach in the ITV-FS programs, except where consistent with terms contained in letters of appointment.
>
> Videotapes of ITV-FS program offerings shall conform to use policies established by the unit member and shall not be routinely kept by the University except for examination review, for make-up of student absences or for the unit member's self-study purposes. Videotapes shall not be used for evaluation purposes except where permitted by department or division evaluation procedure. Scheduling of ITV-FS obligations shall be in conformity with the other provisions of this Article.
>
> Methods of compensation currently utilized for ITV-FS instruction shall be continued in the 1989-1990 academic year. Compensation options shall be determined in accordance with the provisions of Section C.4.
>
> Due to the limited experience with the ITV-FS system, this subsection shall not be subject to the provisions of Article 33, Section B of the agreement, but shall be subject to negotiations within thirty (30) days by a written request of either party.

> It is not the intent of the parties that implementation of the ITV-FS network will result in a workforce reduction.

However, one of the unsettled items during the negotiations for the successor agreement was instructional television. The recent mediated settlement, that will be put out to vote next week, establishes a joint eight member committee to "study and make recommendations on ITV/distance education evaluations, compensation, technical assistance and ownership of materials."

There are many unsettled questions. Are the matters related to distance education all bargainable issues, and even for those that might be, should the issues really be resolved at the bargaining table?

Let me give you some examples of what we have discussed. The selection of faculty who teach on ITV/EdNet and how they should be chosen. Our agreement currently does not interject itself into this issue for class assignments. Compensation for EdNet has been determined by campus past practice, does this still make sense? The same with preparation fees. Should individual faculty be able to determine where the payment of any additional compensation would go since some prefer to their own pockets, others to the ITV/EdNet support services and still others to their departmental coffers. Is this similar to a researcher determining where the grant money goes? What support services, if any, should be provided or guaranteed? This could be in the form of graphics, graders or graduate assistants. Should there be a contractual requirement for all pertinent faculty to be trained to use the new technology? Funds for training and the training that has been available in the past were not always used. Who owns the instructional material? If there is any further use or reuse of the material developed at institutional expense on institutional time, then what? The University System does, for instance, have existing policies regarding intellectual property. The bottom line should be: how do we run a distance learning system that is fair -- to the students, to the faculty -- and in a public institution -- to the taxpayers. I am not convinced the collective bargaining process will provide the complete or right answer. My hope is that the labor-management committee established in the tentative agreement -- the union has promised to select practitioners from their membership and we are committed to selecting academics -- will be able to better sort out the complexities in a more tranquil setting. The most knowledgeable people need to talk and give us their collective thoughts.

Distance learning has been a movable feast and it is often difficult to figure out which utensil is appropriate to use. However, it is now inconceivable that nothing should have been done in the state of Maine to address the educational needs of the people. If the politics dictate a shift I feel it would be in degree, but not direction. The current spate of publicity reflects an uneasiness by some faculty and others over the authorization by the Board of Trustees for EdNet to seek accreditation, a seemingly radical, but not unrealistic concept when you consider that all seven campuses might be utilized by a student to fulfill the degree requirements. There have been too many people served and too many previously dimmed aspirations brought to full light for the process to be stopped or significantly slowed. The reality is that if EdNet does not provide the opportunity, in less years that we can imagine, the University of Somewhere, which could be Stanford or Pittsburgh or even Penn State, will be furnishing the same opportunity in Fort Kent, Portland and New York City living rooms.

Some already envision future higher education as a choice between the residential/social campus with a high cost and the inexpensive campus of the living room/study. One a traditional model we are familiar with, the other staffed with Nobel prize recipients and the like who are also good performers.[5] The latter model comes complete with the full range of electronic library access and laboratory centers located world-wide for support of the science courses. I do not have the answer. But I think I have seen some of the future and although not perfect, it works.

ENDNOTES

1. Connick, George P., "Rapid Changes and Different Choices", Convocation Address, Kansas State University, March 29, 1995.

2. Apologies to Mort Sahl for use of the subtitle of this section. Credit to George P. Connick, President, Education Network of Maine for the ideology in the truest sense of that word, and from whose concepts and words I have borrowed freely (with per-mission of course).

3. Weiss, Jiri. "Case Study: Distance Learning Projects in the State of California." Syllabus, Vol. 8, No. 7. pp. 27-29. April 1995.

4. Information and data in this section are from various Education Network of Maine and University of Maine System publications. Any opinions are the author's.

5. Thanks to Robert L. Culver, Senior Vice President and Treasurer, Northeastern University, whose words on this topic were much more eloquent than this summation.

III. LUNCHEON SPEAKERS

A. Threats to Tenure: Rhetoric and Reality

B. Union Activism: The Response to Regression

LUNCHEON SPEAKERS

A. THREATS TO TENURE: RHETORIC AND REALITY

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It is no surprise that the public threats to tenure, which have always been with us, are all the more fierce and divisive in the climate created by the slashing first hundred days of the Contract for America. As an English professor, and therefore a connoisseur of rhetoric, I have been intrigued by the seepage of the discourse of blame from the rhetoric that informs the Contract into recent diatribes against tenure. Just about everyone in academia viewed, with alarm, Lesley Stahl's February 26 (1995) segment on 60 Minutes, which launched a full-fledged attack on tenure as of obscure origin, and research as the proximate culprit for the problems undergraduates may have in getting into faculty-taught college courses. And there have been editorial attacks on tenure in the Washington Post and the Wall Street Journal during this last year, for example. The most recent media attack I have seen was in Fortune magazine for May 1, where a report on efforts to cap tuition costs turns into the expectable diatribe against tenured faculty who are imagined to live on the bounty of tax and tuition payers without giving back value for their investment. Here is one of the cut lines for that piece: "Professors have so few official duties that it's easy for them to linger, even if they're unproductive" (114). Praising Condoleeza Rice, Stanford University's Provost, as an administrator who is not afraid to "move money from fading fields to hot ones," the article notes that students are turning from "fading fields" like history and classics to "hot ones" like communications and engineering, and it worries that colleges and universities can't "fire historians or classicists hired in boom times and invest the money in other subjects" (112). The narrative engages a myth which prevails in post-Contract America; it invokes the newly elaborated scenario of a nation divided between hard-working upper middle class taxpayers and the irresponsible slackers of anachronistic entitlement who not only do not play their part in an ever more anxious and unstable economy, but do not have to share its anxiety and insecurity. In an economic environment where nobody's job is secure -- where any resistance to unfair, poorly paid, or suppressive working conditions can bring the threat of a replacement to fill the job -- there is a bitter reaction to the claim that without the security of tenure, the very condition necessary for the successful exploration of new ideas and the empowerment of students to think for themselves will be destroyed. The heroes of the prevailing myth are those powerful captains of industry on boards of trustees and a new breed of no-nonsense presidents and provosts, who have the courage to eliminate faculty positions and to dismiss tenured professors without compunction. Thus the Fortune article mentions the leaders of St. Bonaventure and Bennington as having done "noble work in downsizing," only to meet with the barrier of tenure, "a barrier as hoary and entrenched as the ramparts of a medieval university" (112).

In this new accusatory rhetoric, tenure is the academic equivalent of welfare. Faculty members are thought of as the welfare parents of academia -- the single mothers or deadbeat dads who fail to work hard for their children. In this paradigm, research seems to parallel watching soap operas or playing the numbers. Abolishing tenure, replicating the slashing of benefits for recipients of government aid in the Contract for America, is the main goal of this shadow "Contract for Academia."

I do not want to become too fanciful about the rhetoric of the new attacks on tenure, for doing so might trivialize genuine problems with easy satire. But it is important to emphasize the power of rhetoric as we ask the general public to understand the use and value of the tenure system. One example of the power of rhetoric to penetrate even sympathetic accounts of tenure is the description of the American Association of Higher Educations's two-year project entitled "New Pathways: Faculty Careers and Employment in the 21st Century." This well funded, and well meaning, project was announced this March at the AAHE meeting in Washington, D.C. It asks, reasonably, for a dialogue in which all concerned parties think together creatively about problems with the present system of tenure. But deployment of key adjectives underscores the fact that there are only two alternatives to be considered, the stale status quo or an innovative redesign that essentially abolishes tenure. Thus the terms of the dialogue are loaded with oppositional values. Changes in tenure are described as dynamic, progressive, and "new," while the tenure system is characterized as rigid, conventional, resistant to change. Further, change is invoked as an irresistible "pressure" that has its origin not in the decisions made by individuals who might contemplate other options, but as an irrepressible force in the evolutionary history of institutions. Let me quote a paragraph in illustration:

> We see at least four pressures for change, and we don't see these pressures going away. Most of these pressures represent a challenge to the rigidities in the way tenure systems at campuses are currently administered -- challenges, for example, to the length of the probationary period, the criteria by which tenure is awarded, or the adequacy of post-tenure review. Some of these pressures, however, challenge the basic concept of tenure itself. (2)

Notice the lack of any agent outside some unacknowledged Spirit of late Twentieth-Century History in this analysis. And notice how rigidity is set up against change, in an unequal match-up of metaphysically charged concepts.

The four pressures identified as demanding change are equally unanalyzed. First there is the demand that we all have to follow the economic injunction to "do more with less." If in 1993 corporations laid of almost half a million workers -- "a number just about equal to the entire full-time faculty in the United States" (2) -- then academia should itself submit to a similar slaughter. Then there is the second, related, pressure -- that of responding to societal need. Here, I believe that meeting the almost universal criticism that we have not balanced our research mission with teaching undergraduates is one we have to take seriously, as I will later suggest. But there is also a sense that meeting "societal needs" may mean cutting out history in favor of communications in order to meet the market demand. Most of us would say that the crisis lies, rather, in the distortion that market values may restrict our efforts to provide adequate intellectual and cultural capital to our students. Next, there is the imperative that we become "more accountable," with a suggestion that we need to embrace post-tenure reviews as well as all the other assessment movements that have been proposed in the past several years. Again, I believe there is merit in looking critically at the way we maintain our standards within the system of tenure, but there are choices to be made here that are more complicated than the easy mandates suggest. Finally, and most poignantly, there is an appeal to "renewing the workforce," with its implication that the denial of faculty positions to women, minority members, and indeed all junior faculty has been a product of the tenure system, made more vicious by the uncapping of retirement ages. As I have said, no one should resist the invitation to talk about these issues thoughtfully, but I worry that the rhetoric of this project already threatens to determine its conclusions.

In criticizing such discourse, we need to continue our efforts to respond to evolving demands in our profession, but in order to think of a more radical possibility -- beyond abolition of tenure as we know it, the extension of tenure to all faculty in higher education! In thinking so radically, we need to remember that academic freedom is the basis for tenure -- and that it is still in jeopardy throughout the country. In his response to a January Washington Post anti-tenure editorial, Robert M. O'Neil (Chair of the AAUP Committee on Academic Freedom and Tenure) pointed to two very recent cases in which there was a threat of retaliation by denying retention of tenure to public figures as they seek to returned to their institutions: one for admitting that masturbation might be a legitimate topic of discussion in sexual education, and another for suggesting that the point of view of the perpetrators might be represented in courses on the Holocaust. We may disagree about which view is more tenable, but we will not argue about which deserves the protections of academic freedom.

Thus far, I have addressed only the frontal attacks on tenure. And I could point to the more substantial ones in the slew of books that have hit the market since the success of Allan Bloom's The Closing of the American Mind in 1988. But, however embattled these make us feel, however demoralizing, the more significant attack on tenure has been the one many of us have ignored over the years -- the erosion of tenure through the replacement of tenure-track positions with part-time and other non-tenure track instructional positions in academia. Such positions are hidden by the harmless titles derived for them; they are called "adjunct," "post-doc," or "clinical" appointments. But a non-tenure position by any name smells the same. We should understand that many short-sighted efforts in the name of "economy" or "flexibility" to hire "contract workers" in academia bypass the essential protections we have worked to attain for the teacher/scholars in American higher education. The agonized language of administrators talking of the tough choices they must administer in retrenchment exercises should not fool us; they manage to find the money to pay for the choices they want to make -- in the athletic departments, for new research initiatives, for superstar professors.

Let us rehearse the numbers once again, just to remind ourselves of the reality masked by administrative pity stories. According to a rough estimate in August of 1994, 38 percent of our instructors in colleges and universities were part-timers. If we were to calculate in another way, extrapolating for the level of courses that such instructors teach, it would not be too wide of the mark to suggest that at least 50 percent of undergraduate credit hours are taught by non-tenure track instructors, and in service courses -- that is, introductory math, English, language, science, computer courses -- the percentage is probably close to 90 percent. We have some relatively reliable recent numbers on the diminishment of jobs for new faculty, for the Modern Language Association runs a quarterly "Job Information List" from which it has been tracking data for the past five or so years. Its 1994 report was dismal, showing a decline of 26 percent in English and 33 percent in foreign language jobs advertised between 1990 and 1993. But behind these numbers are other facts that make them even worse. One is the prolongation of time taken for the PhD, a lengthening that feeds upon the availability of non-tenured teaching by "ABD's" at research universities, or the extension of post docs. I know of at least two state universities where 70 percent of all undergraduate credit hours in English Departments are taught either by TA's or non-tenure track faculty. And the dean's answer when asked for new lines to meet the demand, is to allocate more graduate support or another "visitor" to the needy department. Thus the picture is one of an increasing disparity in numbers, and in every other measure that should count, between tenure-track and non-tenure track instructors, the latter growing -- from 1981 to '91 by 42 percent, to almost 143,000 positions, and the number of part-timers by 33 percent to 300,000 in the same time span. It is a truism now to state that the working conditions for these temporary workers in academia are dismal. They rarely have retirement or medical benefits. Frequently they have no office space, no telephones, no mailboxes beyond a Kinko's paper box left in some office, and not even desk copies of textbooks to call their own. They are hired late, given no instruction or orientation, and never reviewed either for praise or blame. Left in such a limbo of limited possibilties, the real poignancy is that they keep the desire to find "real" jobs -- to write their ways into tenure-track positions, in many cases. Or, in the vain words I once heard from a doctoral student confronting the choice of an adjunct position, "I'll take the temporary job, but I'll make myself so indispensable that they'll have to keep me!" They didn't keep this earnest young man, and if such ambitious instructors show signs of independence, their jobs may be under attack. I have just heard of a case of such a faculty member in Texas, who was threatened with a lawsuit if she did not change an irate student's D to a C. She was informed by the chair of her department that since she did not have the protections of tenure, she might as well give in to student pressure.

The installation of such "service," non-tenure track instructors into the structure of higher education is especially pernicious because it is silent and because once it is revealed, it divides faculty against itself. Safely tenured faculty pursue their work without thinking very much about what's happening in the introductory and remedial courses. Rewarded solely for advanced research and teaching, they are frequently walled off from academic "piece work," hearing echoes of its effects mainly in the dismal fortunes of their graduate students. Even though AAUP's recent Salary Review indicates that our profession may have a higher proportion of tenured faculty than ever before, those statistics may be misleading because they relegate the loss of positions in the total pool of tenure-track faculty to a footnote. In other words, we professors do not always count the cost of the erosion of tenure to our profession! Once the figures I have mentioned are calculated, we must see that we have lost tenure in the sleight-of-hand substitution of unstable instruction through the new categories of non-tenure track categories that have crept into our departments, colleges, and schools. And if we add the growth of non-tenure track faculty in community colleges, the extent of the tenure loss since 1980 becomes even more abysmal.

It is an ironic twist in the arguments against tenure that there are already so many non-tenure faculty! In such a view, tenure is supposed to have caused this state: "part of the reason for their status is the fact that under current tenure doctrine, everyone feels compelled to pretend that these faculty are truly temporary. We take them in through the back door and pretend they are not there because we are unwilling to confront the sort of careers and employment arrangements that do make sense for the entire professoriate" ("New Pathways," 5).

Thus the professoriate has become an ever more deeply stratified profession. Whereas many schools -- especially the elites which can hide their non-tenure track instruction in teaching assistantships -- have in the past been able to maintain a system which resisted marking "haves" from "have-nots" among faculty, now the segregation of the tenured and tenurable from the untenurable threatens to undo any such collegiality among us.

We must realize, then, that the unceasing attacks will not undo tenure altogether, especially as it is used to attract and retain the superstars of academia. A recent study by Richard Chait, published in a pamphlet for the Association of Governing Boards, concludes that tenure will continue in its familiar dimensions, especially at "first-tier," research institutions where intense competition for outstanding faculty requires the offer of academic freedom and economic security -- those undergirding motivations for tenure. Further, as Chait observes, there is "no compelling evidence that elite institutions have been ill-served by traditional tenure systems" (8). Nevertheless, the current rhetoric puts tenure at risk in the other, very significant arenas of faculty employment -- the arenas in which teaching is primary and research (traditionally measured) is not immediately relevant. The present climate of blame will thus undermine our attempts to safeguard tenure for "ordinary" academic workers and to extend it to the hordes of disenfranchised non-tenure track and part-time faculty; their swelling ranks constitute a more effective undermining of tenure than such frontal assaults as the article in Fortune magazine. It is in the vast, non-elite areas of academia that the real threat to tenure lies and with it lies a threat -- like the one accompanying the Contract for America -- of a deeply stratified academic community marked by the security and ease of the decreasing number of haves and the radical insecurity among the growing numbers of have-nots.

What are the solutions for this silent detenuring of our profession? I wish that an answer would be to "Just say no." But we need to resist in a number of specific ways -- in contractual negotiations and in our professional behaviors.

1. On Retirement: we need to understand that good retirement plans ordinarily lead to retirements at around the age of 65. Thus maintaining generous retirement programs helps to open up positions for new faculty. Mean and stingy programs actually force faculty to stay on longer in tenured positions. We need to keep retirement an attractive option.

2. Buy-outs in some modest measure are probably worthwhile, but wholesale investments in golden handshakes without participation in their planning by continuing faculty have burdened strained budgets and have added a bad odor to tenure. Junior faculty need to be fully envolved in discussions about the disposition of resources that impact on the institution's future. To engage in such discussions, they will need help in understanding the complexities of the ways in which retirement plans may relate to their own economic welfare. And they need to have assurance such budgetary decisions will help to foster rather than deplete the junior faculty. Just take the estimate of David Little, an administrator of Colgate University, about what happens to tenure lines at retirement: "For every three retirements, only one typically leads to a tenure-track hire. The second position is eliminated. And the third is plugged with a professor on a "term" (short for "terminal") appointment of a year or two, or by a part-timer hired for a specific course" (quoted by Showalter). We must negotiate retirement buy-outs to make room for junior faculty on the basis of guaranteed trade-ins of old for new tenure lines. (If the new tenure lines are at an entry level, the institution should be able to capture the difference for its current needs).

3. We must recognize that tenure is an economic inducement for fine minds to stay in the profession. But we must also realize that money itself will never be enough. Joined to a stable salary, the lure of academia for most professors is a community of scholars who work and decide their mutual fortunes together. The ideals of our profession as articulated in the AAUP Redbook point to academic freedom and shared governance as founding principles for our work. We must maintain the sharing of governance as the means to attract and to keep our tenured ranks together. And we must promulgate that ideal as ardently as we promulgate our salary demands.

4. Our graduate students are the future of our profession. We must monitor and safeguard their interests. We can do this not least by forming solidarity with them in their fights for full rights. And to preserve the promise of tenure for them, we need to construct a network of protections for junior faculty as they enter the markets in our individual disciplines. We should refuse to serve on search committees for non-tenure track faculty; we should refuse to accept offers of such short-term solutions in our own departments; we should show that introductory courses demand tenured faculty instructors by teaching them ourselves.

5. We need to cooperate creatively in reasonable calls for post-tenure reviews, but in cooperating, we need to make sure that such reviews are formative, creatively designed, and mutually helpful. To make them more than window-dressing, we need to think hard about teaching and service as integral to success in the professoriate. Thus we must surrender the comforting concreteness of the grant money or published page counts to form our judgments, and risk making assessments of the quality of the long and gradual processes that constitute education. The reward system in academia must be expanded to allow tenure for those who spend their intellectual energies on teaching and service as well as research.

6. Finally, we must protect and foster our own idealism. We must not let the originating motives of our vocations be lost in all the talk of downsizing and restructuring. We must strive to participate in necessary change generously, for the widest benefits, the greatest good.

That means that we keep our compact with the future. Every good society must make that compact. The class and economic stratification in higher education that has fed on the attacks on tenure, and on its erosion, has worrisome parallels with many of the other fractures that now threaten our society. The greatest divide, both in academia and in the general society, is now the one between the old and the young -- between those who know and those who aspire to know, between those who have used the system to become established and those who find the rules changed so that their beginnings are marked by instability. For many of us, becoming professors has been motivated by the challenge of healing such fractures and bridging such divisions. To maintain this idealism, we need to come together again, to reaffirm our commitment to the promise of tenure for everyone -- every professor must be a "full" professor in the best sense of that term!

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LUNCHEON SPEAKERS

B. UNION ACTIVISM: THE RESPONSE TO REGRESSION

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We are experiencing extensive changes on an international scale in our political, economic and social climates. For more than a century the dominant voices in the western world called for reform to correct the blights and inadequacies visible in diverse aspects of our societies. Many significant changes were deliberately instituted to correct these conditions. Governments at the local, national and international levels were the primary agencies for their implementation. In this country the most prominent of these movements were pronounced to be the New and Fair Deals and the Great Society.

But with postwar economic recovery, as well as major local upsets, conservative forces began their revival. They yearned for and preached the restoration of the older shibboleths, despite the previous disasters they had produced. Headstrong, indifferent to the inequities and troublesome conditions they would resurrect, foreswearing communal and humanist responsibilities that were accented in the age of reform, exploiting the uneasiness in the populations stemming from the breadth of the vast number of changes and the abuses by newly installed power groups and employing unwarranted visionary allusions to the past, these conservatives gained significant and even dominant followings in the population. To confuse the debate even more thoroughly these votaries of the past confounded the public debate by attacking political liberalism while extolling economic liberalism, thereby seeding more incongruities.

Labor and unions flourished during the age of reform. Laws were enacted which facilitated the extension of union organization and its coverage of the working population. New groups of employees joined their ranks including white collar, professional, technical and governmental personnel. The expansion became so marked that one prominent American economic academician troubled by their potential influence raised the alarm and warned at the end of the forties of the oncoming "laboristic age."

In truth, unions and their leaders gained a new level of importance in the life of the nation. They were called upon by the governments to help in the reconstruction of the economies and societies and their institutions. Individual leaders were called to join national and local policy and administrative boards. Union leaders became members of the cabinets in a number of countries. Several labor and social democratic governments entered into social contracts with unions on the matters of social and public policy. Labor organizations which had previously relied primarily on their political partners for the formulation of public policy initiated independent efforts in these fields and therefore exercised profound effects upon the nature of public policy. Unions in the Scandinavian countries became outstanding in this effort.

At the workshop level these organizations won significant influence through the formation of works councils and programs for codetermination and representation on corporate boards. Earnings rose markedly; benefits expanded; social insurance programs grew in coverage. Hours were reduced and in several countries were standardized at the weekly level of 35 or 36 hours. Standards of living improved considerably for the mass of people. Even managements unfriendly to unions began recognizing the positive contributions which worker counsel could make to the improvement of the work environment, morale, productivity and enterprise effectiveness. They invented diverse forms of employee involvement including "cell manufacturing" even while they avoided and resisted unionization and shunned the phrase "worker participation."

But beginning with the seventies and continuing to the present, a sharp reversal appeared. The economies became fragile, recessions, more frequent and growth, more modest. Unemployment rates rose. In Europe, unemployment has exceeded ten percent for long periods of time. Domestic and international competition in the rate of technological innovation soared, creating malaise and fear in the work force. Downsizing of plants and closings were widespread. Acquisitions and business mergers swelled the industrial toll. Adding to the tension is the multiplication of giant and multinational corporations, divorcing the sites of the decision-makers from the individual operations.

A similar disquietude became evident on the political front. Where conservative governments prevailed, few offered programs for the pressing problems. Following the American pattern, more relegated decision-making to the local level, where people tended to be less prepared and with fewer resources to tackle the new issues. Recourse to labor and social democratic governments also show limited effectiveness. Many of their nostrums, like public ownership, proved deficient because of poor administration and scant initiatives. Many diluted their traditional programs and values with the wholesale adoption of more conservative prescriptions. As for foreign policies, governments followed domestic priorities rather than international goals, inhibiting appropriate international action.

In the face of these uncertainties, labor and union advances declined abruptly. They had to devote increasing amounts of their resources and time to defensive measures to protect past gains and minimize displacements and reductions in benefits. In this effort, they were more effective than in the past. But disappointment spread in the ranks. Confidence in the future sank.

There have been many setbacks. The trade union movements contracted in many countries. Among these weakened institutions were those in the United States. Only singular countries could report slight expansions or the maintenance of previous membership levels. In our country, the foes become more vigorous and outright in their opposition. Saddled with an individual employer oriented system of certification for bargaining rights, American unions become victims of an induced system of shop class warfare. With higher rates of shop turnover and slimming, the union movement found its base eroding. Employers further added to the erosion by prolonging the process of certification. They relocated their sites of operation to areas less friendly to unions and extended the process of negotiations of contracts. Employer spokesmen and conservatives fought changes in the law and administrative procedures to facilitate the process of union certification and prevent the hiring of scabs during occasions of industrial strife.

Another source of resistance to further reform has been the continued outpouring of analyses by mainstream social scientists and journalists. As their intellectual systems remained wedded to a reliance on market decision-making and the exclusion of ethical, humanistic, social and political concerns and realities, their products and teachings, by and large, tended to support anti-union dicta, and oppose collective action by workers. But they and the courts nevertheless sanctioned corporate (collective capital) structures and many manipulative devices common in these fields. At the international level, the Organization for Economic Cooperation and Development (OECD), prodded by the United States, became an oracle for the promotion of these views.

Among the fundamental changes which occurred was the influx of women into the work force. But less than a handful of countries took steps to define appropriate conditions, terms of employment, and services for women and their families. Newly constituted women organizations began this uphill battle to create and enforce the new code. The subsequent progress has been very modest.

Another significant employee group warranting attention is the expanding number of part-time and contingent workers. Foreign workers and their families, whose numbers have exploded, have also been neglected. In most countries, particularly in the United States, only a handful of unions addressed themselves to these opportunities.

One source of current unrest and unhappiness among workers in most countries is the continuing pressure by employers, both public and private, for concessions and the relaxation of benefits or even salaries previously attained. We know of the cases reported for private industry, but the movement for such regressive steps has become incrementally stronger in municipal and state governments. The pressure is also mounting in both private and public collegiate educational organizations. The financial problems confronting them now exist at the income and expense levels. With school fees rising we are forced to discuss how to help students finance their education. Pressure for retrenchment of services requires schools to locate new sources of income. As never before, unions in higher education are confronted with these problems and are called upon to help provide answers to these challenges.

Despite the rising dissatisfaction and industrial and social uneasiness, the actual volume of overt industrial and social strife has remained limited. Conflicts are largely centered around specific groups such as aliens, women, racial and ethnic groups, seniors and youths. Ordinarily, we would have expected that tension would make itself visible in industrial strife, for the traumatic experiences have been widespread and sharp. Enumerating some of them makes this expectation evident. Among these are the recessions, lay-offs, plant shrinkages, wholesale abandonment of workshops, the cancellation of lifetime guarantees of employment, reductions or the elimination of benefits, disregard for the humane preachments of the human resource management philosophy, downgrading of the reemployed discharges, disappointments of the dismissed employees who ventured in independent enterprises, and the threats of the reduction of public systems of aid. Yet, the industrial scene remains relatively subdued.

Journalists and public opinion pollsters have speculated about the reasons for the restraint, but they have not truly defined the mood. How long will this state endure? They have merely defined the groups who now serve as scapegoats for the reversals and difficulties which include the immigrant, the homeless, the poor, the handicapped and the poorly educated. The politician, of course, includes the malingerer. But the more realistic citizens know that these groups are the victims rather than the initiators of our difficulties. They know that there is a shortage of job opportunities and inadequate services for the work force who need help through training, rehabilitation and relocation. But these measures are neglected and curtailed. The main concern of the opponents is to cut public expenditures and to avoid inflation. The human price of such a course is slighted.

What is needed is public action directed to job creation and programs for employee training, rehabilitation and relocation. Keynes provided one answer in the thirties that served us well for three decades. But economists have not as yet fashioned the logic needed for the new era. Private capital and managerial leaders prefer continued reliance on themselves or outside incentives or subsidies or financing. The latter have been inadequate in scale to achieve the desired goals.

The responsibility for prodding the actors into motion now rests with the trade unions. They emerged to organize, give vent to the complaints and expectations of employees and the less privileged groups in society and to secure the corrections for the sordid conditions and status which will prevail and to achieve the realization of the new visions.

To the extent that their voices have been silent or subdued in furthering these ends, unions have been derelict in the discharge of their functions. Existing restraints on their part are particularly glaring as we are currently witnessing the appearance of many different spokesmen for diverse segments of the population, including conservatives. They are aggressively pressing their claims and views. But labor has been quiescent.

Unions have reached this condition in part because of the prevailing orientation of the organizations, usually identified as business unionism. This model, which was crystallized at the end of the preceding century and modified slightly with the formation of the AFL-CIO in the fifties, continues to dominate the thinking and action of the present structure. It has severely constrained the movement's initiatives. Four of the resulting limitations need enumeration. First, it has constrained the use of alternative tools and processes for the furtherance of its goals, particularly in the field of governmental and communal action at the international, federal and lower levels. Second, it has focused attention primarily on individual shop conditions and terms of employment and governmental regulation and control of labor conditions fostering regulation and control of labor conditions, nurturing a parochial outlook among leaders and members, stressing at most local labor or product markets. The American industrial relations system, through its election system for certification, has reinforced these narrowing areas of concern. This structure contrasts sharply with the emphasis in other countries on industrial and national dimensions which also dominated the union orientation in the United States at the beginning of the century. Third, under employer and legal pressure the structures and scenes of action are highly decentralized. Earlier industrial and local labor market systems of bargaining have often been replaced in many areas by local bargaining. Pattern bargaining existing in the earlier years has also been weakened or even eliminated in many areas. Finally, interest in creating new organization has been diminished with greater attention being directed to the administrative union functions, thereby undermining the base for greater bargaining power.

The call therefore is for revamping the trade union orientation to reflect a more encompassing program of activities and interests reflecting the broad expectations and aspirations of the people the unions represent.

This paper does not undertake to sketch a full platform for the future of the trade union movement. We have selected three areas to illustrate this new direction. The first is the organization of more employees. Both verbally and practically, there is national recognition of the high priority this activity must gain. The leadership appears to have abandoned the negative outlook of George Meany, the first President of the AFL-CIO. In the early seventies he asked in a very defensive mood, "Why should we worry about organizing groups of people who do not want to be organized if they prefer to have other speak for them and make decisions which affect their lives, without effective participation." The successor officers have adopted a more pragmatic attitude. They recognized that bargaining power in the organized units both in the shop and on the political front is determined to a considerable extent by the degree of general organization as witnessed by the common judgment of scholars and journalists that the unimpressive record of wage and benefit advances in recent years is substantially due to the reduction in union coverage in this country.

The central body has overridden prior reluctance to undertake organizing programs on its own and initiated three efforts. First is the initiation of organizing drives in several communities. These, however, were not productive of positive

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results. Second, is the formation of an agency for the training of field organizers, which has attracted many new types of persons for this undertaking, particularly those with college training. The third is a modest national public relations program. It is apparent that more aggressive and broader appeals are essential to affect employee and public attitudes toward unionism and collective bargaining. To awaken a belief and trust in unionism as a positive course for realizing employee expectations, demands not only addressing specific small groups of employees but also the general national mass of employees and the public. A faith has to be implanted that organizing is a positive course for attaining improvements and status for all employees in our industrial system.

Past experience indicates the value of eloquent and dynamic leadership and the support of already organized employees as emissaries to potential new recruits, a concrete program for constructive action and telling illustrations of the varied improvements effected through unions in the workplace and community.

A second area for development is that of activities in local communities in fostering services for employees. In the past, unions played a vital role in promoting such agencies and once again it should be assigned a high priority. This area should rank particularly high among unions in the collegiate field. With the increasing pressure for public funds, the great mass of citizens must learn about the contributions the schools make. The faculty must therefore perform an important role in this educational process. The support of the general trade union movement is useful.

A third but different area is taxes. Taxes represent a field in which the struggle is keen among groups in the community and nationally. Just as the middle and upper classes are most sensitive and active about these issues so must unions undertake to represent employee claims for equity.

The stagnancy, if not the deterioration in labor standards and industrial relations in this country, the threatening black clouds of regression accumulating on the national and local political horizons, and the increasing disparities in our income distribution in the face of the rising levels of economic productivity and business profits beckon us to pause and consider the health of our economy and society. While the rattle of the drums of regression continues to be heard, we must determine whether our course is the right one and, if not, return to the program of reform which rewarded us in the past with progressive advances.

IV. FUNDING HIGHER EDUCATION

A. Public Higher Education Funding in the Jaws of Balanced Budget Conservatism

B. Funding Higher Education in a Global Economy

C. Fiscal Realities in Higher Education

FUNDING HIGHER EDUCATION

A. PUBLIC HIGHER EDUCATION FUNDING IN THE JAWS OF BALANCED BUDGET CONSERVATISM

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Over the past twenty-five years taxpayer support for all higher education has plummeted. Just between 1979 and 1992 state and federal backing of higher suffered even more. From its zenith in 1968, when public higher education consumed 23.4 percent of direct general expenditures of state government nationwide, state assistance declined steadily, falling to a thirty-year low of 17.3 percent in 1992. A number of factors help explain this tumultuous decrease. Competition for state funds for K-12 education, prisons, Medicaid, and welfare have weakened higher education's political and fiscal viability. But higher education's financial woes go beyond competition for limited resources from other policy areas. In fact, this fierce competition itself is a symptom of a radical shift in public policy that is driven by a new anti-statist public philosophy that may best be characterized as Balanced Budget Conservatism. In other words, the fiscal problems facing higher education are ideological. The ideological dimension of the problem aggravates and reinforces an already grim fiscal scenario.

The first two sections of this essay examine the nature and magnitude of the problems confronting higher education. The next section briefly looks at short-term political responses to the budget crunch by focusing on United University Professions' response to the Governor's proposal to cut tax support for the State University of New York by 31.5 percent. The fourth section discusses the roots of Balanced Budget Conservatism; a presentation of the concept follows. Conclusions and their implications are discussed in the final section.

DATA OF DECLINE

Let us take a closer look at that twenty-five year slide in tax support for public higher education. In fiscal year 1992, direct state government expenditures fell to 17.3 percent of general fund spending, down from 17.8 percent in 1991 and 18.3 percent in 1990. The 1992 share represented the smallest portion allocated to public higher education since 1963.[1] A look at the proportion of state tax revenues for the operation of institutions of public higher education reveals a similar downward trend. In 1992, for instance, higher education institutions received close to $35.3 billion for operations. This was over $5 billion less than they would have received if funding had stayed at the average rate for 1975-1983.[2]

The same trend appears again when we look at state government expenditures per $1,000 of personal income. While the gamut of expenditure varied greatly across the states, ranging from a reduction of $9.86 in Alaska to an increase of $9.10 in North Dakota, expenditures overall increased by a mere 12 cents per $1,000 between 1984 and 1992.[3]

This funding pattern occurred despite two years of continued growth in the national economy, a sustained upsurge that reached a ten-year high growth rate of 7 percent in the last quarter of 1994. The economic recovery, however, has varied in different regions of the United States. The Northeast, for instance, has been hit the hardest. It lost more than 7 percent of its jobs since the 1989 recession and is not expected to recover them until sometime toward the end of 1996 for the Mid-Atlantic states and in 1998 for New England. Unlike the Northeast, the South has experienced an ongoing economic boom and is expected to achieve significant employment growth rates through the fall of 1998.

Regional economic conditions affect tax support for public higher education. In the South, state appropriations to public higher education jumped by 12.02 percent between fiscal years 1988-89 and 1992-93. The Northeast did not fare so well. During the same period, the Mid-Atlantic states reduced tax support by .24 percent and the New England states dropped appropriations by a whopping 16.32 percent.

The same trends apply to local assistance to public higher education. It increased in the South by 28.49 percent, compared to a jump of 8.5 percent in the Mid-Atlantic states. (New England continued to make no local contributions to public higher education.) Charts 1, 2, and 3 below[4] illustrate state and local appropriations by region and state.

Chart 1: New England States

	State Appropriations (Millions)			Local Appropriations		
State	FY88-89	FY92-93	% Change	FY88-89	FY92-93	% Change
Connecticut	458.6	418.4	-8.77	0	0	0
Maine	162.5	165.1	1.60	0	0	0
Massachusetts	695.5	489.0	-29.69	0	0	0
New Hampshire	72.4	74.0	2.21	0	0	0
Rhode Island	124.1	112.6	-9.27	0	0	0
Vermont	44.5	44.3	-0.45	0	0	0
TOTAL	1,557.60	1,303.40	-16.32			0

Chart 2: Mid-Atlantic States

	State Appropriations (Millions)			Local Appropriations		
State	FY88-89	FY92-93	% Change	FY88-89	FY92-93	% Change
New York	2597.5	2281.8	-12.15	317.3	303.9	-4.22
New Jersey	1055.0	1133.6	7.45	116.8	153.8	31.68
Pennsylvania	1098.4	1272.5	15.85	53.5	69.2	29.35
Delaware	105.6	120.6	14.20	0	0	0
Maryland	676.5	711.3	5.14	101.2	112.3	10.97
TOTAL	5,533.00	5,519.80	-0.24	588.80	639.20	8.56

Chart 3: Southern States

	State Appropriations (Millions)			Local Appropriations		
State	FY88-89	FY92-93	% Change	FY88-89	FY92-93	% Change
Alabama	769.35	814.4	5.86	2.2	2.4	9.09
Florida	1499.8	1837.2	22.50	0	0	??
Georgia	905.2	1046.2	15.58	8.0	10.5	31.25
Kentucky	510.4	601.1	17.77	0	0	0
Louisiana	483.0	575.7	19.19	0	0	0
Mississippi	380.1	338.1	2.10	21.4	24.4	14.02
N. Carolina	1269.1	1484.7	16.99	53.0	69.3	30.75
S. Carolina	549.0	605.6	10.31	14.2	21.0	47.89
Tennessee	672.2	747.5	11.20	0	0	??
Virginia	976.0	879.8	-9.86	11.4	14.0	22.81
W. Virginia	225.6	250.2	10.90	0	0	??
TOTAL	8,239.70	9,230.50	12.02	110.20	141.60	28.49

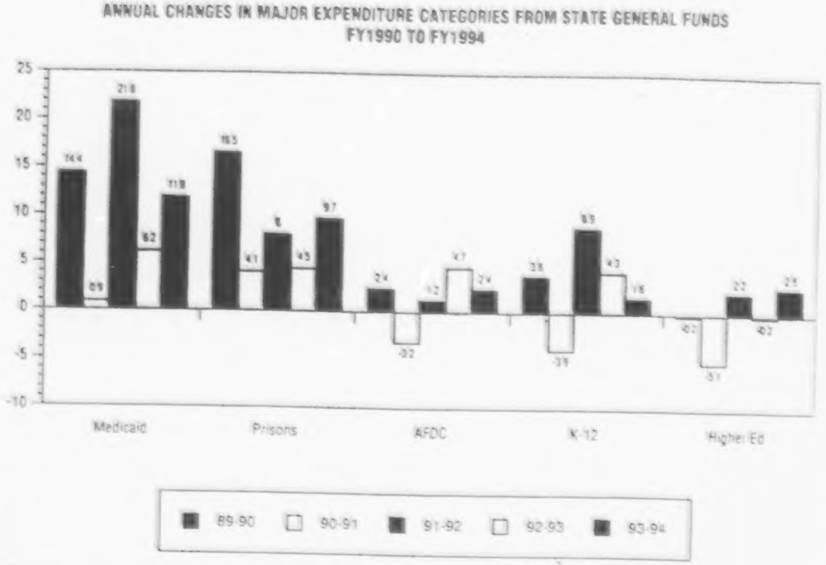
According to Edward Hines, an authority on state expenditures,[5] much of the decline in higher education support may be traced to increased competition for the shrinking public fiscal pie. The competition is fiercest in those policy areas mirroring the failures of the private economy: prisons, Medicaid, and Aid to Families with Dependent Children.

In each of the fifty states, the share of taxpayers' monies going to prisons has increased steadily while the share going to public higher education has shrunk. The consequences of these priorities are clear: the United States has the second highest imprisonment rate in the world. In fiscal 1991 Americans spent $19,403 per prisoner, compared to $5,300 per student in public higher education.[6]

Medicaid also continues to rise. Federal mandates, a sluggish economy, and rising costs of health care drove the share state budgets allocated to Medicaid to 17 percent by fiscal 1992, up 7 percent from its 1987 level. There is little reason to anticipate significant change in these numbers, which means that Medicaid will continue to draw funds away from public higher education.

Aid to Families with Dependent Children (AFDC) grew more slowly over the same time, leveling at about 3 percent nationwide, as most states either cut or froze spending levels. State support for K-12 continues to climb and should continue to increase, although at a slower rate because tax conscious state officials are still reluctant to pass costs and higher taxes back into local school districts. Chart 4 presents the annual changes in state expenditures on Medicaid, prisons, AFDC, and higher education between fiscal 1990 and fiscal 1994.

Chart 4



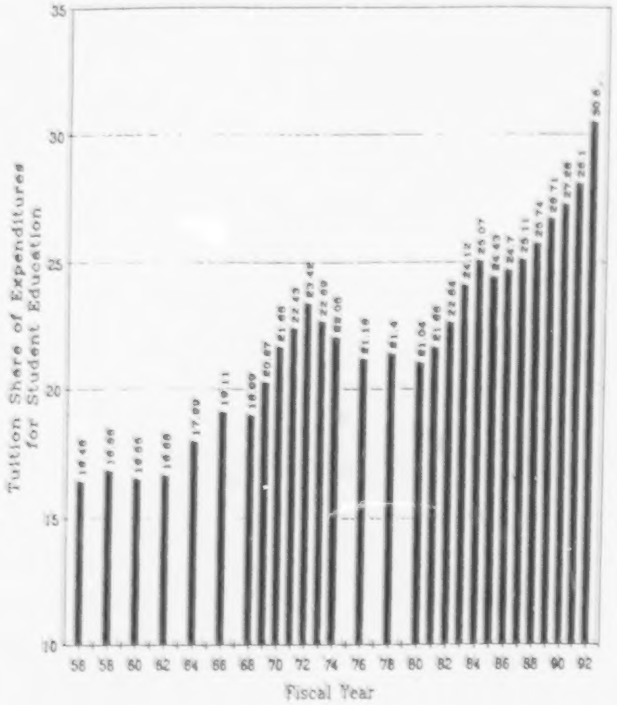
SOURCE: Mortenson (1994b)

To the extent that the ideology of Balanced Budget Conservatism masks failures in the corporate economy and justifies rising levels of unemployment and poverty, we should expect to see continuing increases in prison spending. Studies have shown a positive correlation between increased unemployment and incarceration. While unemployment breeds poverty and increased poverty drives up the need for Medicaid and AFDC, the fiscal crunch on the states is slowing growth in AFDC and, given the recent electoral victories of Republicans, may eventually do the same for Medicaid.

SHIFTING COSTS TO STUDENTS

With the shifting of all these funds away from higher education, who fills the cost gap? Students and parents. Moving financial responsibility away from taxpayers and onto students has become a key response to higher education's funding problems. Between 1979 and 1992, federal dollars to higher education dropped by $4 billion; state and local governments' share plummeted another $7 billion. In the public sector, tuition revenues increased as tax support declined. Chart 5 below shows the dramatic and constant increase of tuition as a revenue source over the past three decades. In 1960, tuition covered about 16 percent of public higher education's costs. By 1992, tuition accounted for over 30 percent. The biggest leap in the nearly forty years of available data occurred between 1991 and 1992 when the percentage increased from 28.1 to 30.5.[7]

Chart 5: Tuition Share of Expenditures for Student Education in Public Higher Education Institutions Fiscal Years 1956 to 1992



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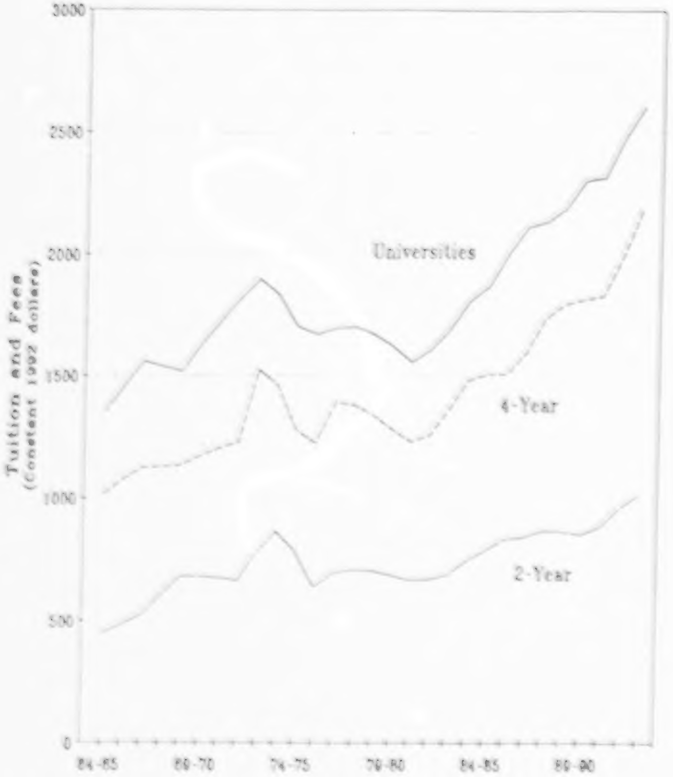
Tuition charges are but one part of the total financial costs of higher education. A broader measurement is the institutional charges, including tuition, fees, room and board. According to data collected by the National Center for Educational Statistics, institutional charges have grown steadily since 1981. In constant 1992 dollars, average tuition and fees at public universities went from $1,349 in 1964-65 to $1,900 in 1972-73. They fell to $1,558 in 1980-81 but have risen considerably since, reaching $2,610 by 1992-93.[8]

Other four-year public colleges followed the same pattern but at about $300 to $500 below public universities. Institutional charges at public two-year colleges are lower than their four-year counterparts to begin with; increases have been considerably less. In 1992, for instance, tuition and fees averaged $1,018, an increase of $352 since 1980-81.[9] Chart 6 graphs the growth of tuition and fees at public universities, colleges, and two year schools.[10]

Chart 6. Tuition and Fees at Public Institutions
1964-65 to 1992-93



The decline in the purchasing power of federal assistance to undergraduates has accompanied rising institutional costs of attending college. Between 1980-81 and 1990-91, in constant dollars, costs for public universities increased by 27 percent; for private universities, costs jumped by 54 percent. At the same time, the value of the Title IV financial aid increased by 23 percent, and median family income grew by 15 percent. In 1979 the maximum Pell Grant award accounted for 46 percent of the average costs at post-secondary schools in the United States. For 1991-92 the maximum Pell Grant had fallen to 25 percent of the average cost. When this reduction is combined with drops in state spending on higher education, the results, according to OPPORTUNITY, are clear. "[Government] programs are not working, and nothing is being done to rectify the disastrous trajectory we are now on."[11]

RESPONSES

The decline in taxpayer support for public higher education has triggered a number of responses. One, of course, is restructuring, which is often a euphemism for downsizing. In New York State, for instance, proposed cuts in tax support of 31.5 percent for the State University and 24 percent for the City University would have brought massive campus closings and reduced access at a time when the number of high school graduates is increasing. The New York scenario may be extreme; it is not atypical. Virtually every state has experienced similar difficulties in recent years.

The restructuring scenario comes at a time when new high school graduates are expected to increase by 34 percent between 1991-92 and 2007-2008.[12] Restructuring may mean reduced access at a time when social, economic, and demographic trends suggest that higher education is becoming essential for the kind of workforce training necessary to compete in the new global economy. Reduced access, then may undercut the future economic well-being of the nation.

Increased political pressure on state policymakers is one path higher education interests have taken to maintain adequate funding necessary to avoid downsizing. Current strategies focus on the economic benefit gained from monies invested in public higher education. In New York State, for instance, the United University Professions responded on many fronts to the proposal to cut SUNY by 31.5 percent. UUP's action plan set the standard for others to follow. We waged a hard-hitting, award-winning media campaign. The campaign was part of a statewide media effort that culminated in thousands of calls from New York State United Teachers (NYSUT) phone banks to swing Republican senators. NYSUT, our 350,000 member umbrella affiliate, poured hundreds of thousands of dollars into this effort.

We also did the usual Albany lobbying, but our grassroots troops were more aggressive and better prepared than ever before. Also, I should add, the size of our lobbying army increased tenfold, as dozens of new volunteers joined our ranks. We formed a war room and kept records of all elected officials and their attitude toward UUP and SUNY. Everyday we won new friends in the legislature. The Albany lobbying effort was supplemented by the new district lobbying effort that puts UUP lobbyists in virtually every home legislative district in the state. When the state unleashed its attack on SUNY, we had a strong structure in place to support an effective political response to the crisis.

We sought to gain the support of Governor Pataki's backers in the business community. So we went into the Governor's backyard and sent letters to the thousands of vendors who benefit from selling goods and services to SUNY campuses; we issued "SUNY Bucks" and conducted walks about town in which we informed merchants how SUNY cuts would hurt their business; we asked these merchants to write letters to key politicians -- and thousands did! We also sought, and received the support of chambers of commerce and local business and community groups across the upstate area.

We wrote our many SUNY alumni and the parents of thousands of current students, organized and participated in numerous demonstrations; in short, we overlooked no opportunity as we searched for ways to keep our university afloat.

Although no final budget has been passed, both houses have recommended significant restorations to SUNY.

THE ROOTS OF BALANCED BUDGET CONSERVATISM[13]

The problem with traditional political activism, although essential, is that it does not address the roots of the problem -- a sluggish economy papered over by a strong anti-statist ideology. Political activity is only a temporary palliative to a long-term problem that is rooted in the structure of our society.

Two decades of national economic decline have galvanized a deliberate political effort to shift attention from the private causes and social consequences of stagnation, inequality, and ballooning federal debt. Balanced Budget Conservatism -- an apologia for government inaction -- is an ideological response designed to deflect our attention from the real causes behind the dismal trends of the past twenty years. It is a public philosophy that rejects the old values of New Deal politics that Theodore Lowi called "interest group liberalism." Indeed, interest group liberalism touts interest group politics as an essential ingredient to a democratic politic committed to state intervention and managed economic growth. It is based on pluralist conception of group power that urges all interests to organize to advance their political demands. The political process responds to this organization through an accommodation that assumes that all competitors share, more or less, in the pork. As long as the groups make their demands "within" and not "against" the political system, and as long as the political system's resources continue to expand, interest group liberalism appears to incorporate and pacify all social classes and interests. In so doing, interest group liberalism managed to roughly coordinate public policy, economic reality, and political ideology.

Rooted in three trends that have wrought havoc on the U.S. economy, Balanced Budget Conservatism distorts economic reality by shifting the focus of public discourse from the private economy to public government. The first of the economic trends is the long-term loss of domestic jobs. America's large corporations, preoccupied with global competition, declining growth rates, and increasing pressures to lower costs, are constantly exporting jobs to cheap labor areas and, more recently, replacing workers with robotics and other high-tech devices. In the post-World War II period, recoveries typically increased jobs by between five and seven percent. The most recent recovery, between February 1992 and March 1993, brought an increase of jobs of less than one percent. This trend is occurring in the low-paying service sector as well as in higher-paying heavy industry. As Sid Plotkin and I note in our Private Interests, Public Spending, "...the fully automated fast-food stop will soon join automatic tellers and the charge-card gasoline pumps as labor savings devices of the automated service sector." Perhaps the concept of a "jobless recover" best puts this issue in perspective.

Slow economic growth and jobless recovery are accompanied by federal paralysis on the deficit question. In the past, Washington pump-primed a sluggish economy back into shape. Even Ronald Reagan used this approach, pumping hundreds of billions into defense spending while simultaneously cutting taxes. The result was $1.3 trillion in new debt, the largest peacetime credit spree in American history. The very magnitude of the debt and its costs to taxpayers helped reshape the political agenda. By 1992, interest payments on the national debt amounted to 14 percent of federal spending, more than Washington spends on federal aid to all states and cities in the United States. Growing concern with the deficit, along with the realization that corporate-led economic growth was not enough to pay bills, placed enormous pressures on Congress and the President to cut spending. These pressures, combined with a fear of conservative reactions on both Wall Street and Main Street, prevent the national government from stimulating the economy with new doses of spending.

Both political parties have bought the mantra of "no more taxes, no more spending." Bill Clinton learned this lesson shortly after winning the 1992 presidency when he could not even pass a small jobs bill through Congress. Abandoning the stimulus approach, Clinton echoed the no-spend, no-tax mantra by promising to spend down the deficit by having "no tax increases without spending cuts."[14]

Finally, state and local governments, squeezed by years of slow growth and declining federal assistance, are lucky to stay one step in front of spending cuts and tax increases themselves. When it comes to economic power, state and local governments are the weakest links in the political system. They compete with each other to attract business, create a healthier economy, and form a stronger tax base. But the competition is built upon a downward spiral of taxes and wages. As private capital flees high wage and tax states to more friendly environs, abandoned states adjust by lowering taxes, cutting services, and looking for other ways to make the investment climate more friendly to business.

The economic crunch at all levels has been worsened by the new "Go It Alone" federalism introduced during the Reagan years. The Reagan gospel held that federal policies and regulations, not the malfunctioning corporate economy, were the fiscal culprits. Let any state that wanted to fix its own problems -- with its own money. While the Reagan administration was running record deficits and singing the praises of state and local governments, it also made dramatic cuts in federal aid to the states. Between 1981 and 1988 national grants-in-aid to state and local governments fell from about 26 percent of state and local expenditures to barely 18 percent. State taxes as a percentage of total revenues raised by state governments grew from 23.9 percent in 1980 to 26 percent in 1983. And this was only the beginning. With the onset of another recession by the end of the eighties, state taxes continued to climb, jumping by $10 billion in fiscal 1990 alone! Despite this, declining revenues and simultaneously increasing costs created a combined budget gap of between $40 and $50 billion in forty states for 1991. In 1990, California led the pack with a $15 billion deficit, with New York a somewhat distant second at $6 billion in the red.

The states, to say the least, are poorly equipped to compensate for a financially pressed national government. Yet, they employ seven times more workers than the national government. Consequently, when the failures of the private economy worked their way through Washington down into state and local governments, the political response of reducing taxes and cutting programs was a familiar one. And that is exactly what has been happening. The American Federation of State, County and Municipal Employees projected a loss of more than 50,000 state jobs in the United States just in 1991. New York State alone lost about 7,000 jobs that year. In the ongoing onslaught, another 11,000 New York public workers have been targeted for the 1995-96 fiscal year. And this is still the beginning.

BALANCED BUDGET CONSERVATISM: THE CONCEPT

One particularly striking characteristic of contemporary politics is the way both political parties have refracted the economic crisis. Both Democrats and Republicans view the reduction of the federal deficit as the key political priority. Even President Clinton, who tried to jump-start the economy with a $19 billion spending plan, vowed to reinvent government and to reduce the federal workforce by 100,000, while slashing spending by $500 billion during his first term. When leaders of both parties cite the federal deficit as the root cause of the nation's ills, they are suggesting that the investment practices of the private corporate sector are legitimate. They also are saying that government spending choices are soiled by political considerations and thereby need special scrutiny and discipline.

In effect, both parties have revived an old ideology that we call Balanced Budget Conservatism. This ideology is based on three simple principles: governments must live within their fiscal means; state and local governments should have the main responsibility for taxing and spending; and cutthroat competition among groups for resources with local jurisdictions should be celebrated.

Balanced Budget Conservatism splits the economic majority and shields corporate power from responsibility and mass political challenge by wedding a tough-sounding rhetoric of fiscal common sense to a soothing appeal of grass roots democracy. The marriage of fiscal responsibility to grass-roots democracy justifies the shift of substantial amounts of economic power to state and local governments, even though state and local governments are the weakest link in the chain of American politics. Instead of people at the grass roots pressing leaders for a more productive economy, the economic majority, fragmented through some 80,000 local governments, fights to make its own way by holding down taxes here, adding new or cutting old social programs there, and trying to hold onto old or attract new businesses. This shift forces politicians to choose more carefully between taxation and spending. Conservatives are betting that lower taxes, particularly on the state and local level, will prevail over increased spending.

In short, Balanced Budget Conservatism pits one American against another and against the national government. It convinces the citizenry to forgo united efforts to control corporate national political power as a means to control corporate economic power. Then, appealing to states' rights and local control, it encourages citizens to rely on state and local governments to meet needs that these governments sometimes lack the economic ability to satisfy. This failure further feeds anti-statist sentiments. As incomes drop and jobs disappear, as taxes increase and prices rise, taxpayers strike at the obvious target: government. It is within this developing ideological context that we must understand the plight and prospects of public higher education in the United States.

PROSPECTS

Public higher education in the United States is undergoing a major crisis. On the one hand, demand is increasing. For instance, the number of new high school graduates is growing again, with a projected increase of 34 percent between 1991-1992 and 2007-2008. It also appears that higher education is becoming increasingly more important to training a workforce capable of competing in the global economy of the 21st century. Statistics show that people with baccalaureate degrees earn 73 percent more than high school graduates during their worklives, and the gap is widening. In 1975 the difference was under 50 percent. Governments, then, are becoming more dependent on the college educated to provide a solid tax base.

The need for higher education may be intensifying, but the government's ability and willingness to meet this need is diminishing. Taxpayer assistance to public higher education continues to wane. A long-term decline in wages, creeping levels of unemployment, and the erosion of its middle class and corporate tax base has forced the states to reduce tax support to public higher education. Competition from other policy areas channel limited funds away from public higher education.

The main policy areas are rising health care costs, mostly Medicaid; criminal justice, particularly prison construction and maintenance; costs of K-12 education, costs that are exacerbated by a system of local taxation that encourages state politicians to increase funding; and finally, welfare costs, which are now under attack in many states. If this is all not bad enough, there is also at play an important ideological veneer to justify the choice of cutting public spending. This, of course, is the ideology of Balanced Budget Conservatism.

The threat the current political and economic crisis poses for public higher education is severe. Rising costs, declining financial aid, and limits on enrollment all threaten student access at a time when it is needed more than ever. Many policymakers seem to know that higher education is too important to starve, and they are looking at ways to restructure public policy on higher education. In some states, there is an ongoing reevaluation of the mission and structure of higher education, the kind of students attending public institutions, and the perceived need to increase faculty productivity. As demand for the product climbs amidst declining fiscal resources, techniques such as distance learning are moving to the forefront of reform. Most policymakers agree that it is not time for business as usual. Some states still seem to be counting on the economic recovery to solve their higher education problems. But these days economic recovery is not likely to be the answer. In fact, such phenomena as the "jobless recovery" might some day suggest that economic changes are rendering mass higher education a waste of taxpayers dollars. Why train people for nonexistent jobs? This could, in the long run, drive demand down and justify restructuring public higher education into a more elitist institution. As long as Balanced Budget Conservatism provides the citizenry with its world view, the problems and issues discussed here are likely to worsen.

ENDNOTES

1. "State Colleges and Universities Share of State Government Expenditures Declined Further in 1992," Postsecondary Education OPPORTUNITY, June 1994, p. 9.

2. Ibid., p. 12.

3. Ibid.

4. Taken from State Profiles: Financing Public Higher Education, 1978-1993. Washington, DC: Research Associates of Washington, 1993 pp. 206-218.

5. Ibid. Also, Zumeta, William, "State Policy and Budget Developments," The NEA 1995 Almanac of Higher Education, pp. 77-82.

6. "Infatuation with Incarceration," OPPORTUNITY, October 1994, p.7.

7. "Restructuring Higher Education Finance: Shifting Financial Responsibility from Taxpayers to Students," OPPORTUNITY, August 1994, p. 11.

8. "Institutional Changes," OPPORTUNITY, February 1994, p. 6.

9. Ibid., p.7.

10. Zumeta, p.85.

11. "Family Income Difference Influence Educational Opportunity at Every Step Toward Bachelor's Degree," OPPORTUNITY, June 1994.

12. Zumeta, p. 73.

13. The following two sections are drawn from Sidney Plotkin and William E. Scheuerman, Private Interests, Public Spending (Boston: South End Press, 1994).

14. "Clinton Sees Need to Focus His Goals and Sharpen His Staff," The New York Times, 12 May 1993, pp. A1, B9.

FUNDING HIGHER EDUCATION

B. FUNDING HIGHER EDUCATION IN A GLOBAL ECONOMY

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Higher Education Services
National Education Association

I am going to begin my talk with the premise that -- the future of our economic vitality as a nation is tied to the well-being of higher education. The Secretary of Labor, Robert Reich, noted:

> Education is a key component of any nation's success in the global economy. In the new global economy, the only resource that is really rooted in a nation -- the ultimate source of all its wealth -- is its people. To compete and win, our work force must be well educated, well trained, and highly skilled (1993).

Higher education in the United States is big business -- a $100 billion business, representing 2.7 percent of the gross national product. No other nation has so many different institutions available to large numbers of students. The 3,331 institutions employ some 800,000 faculty and one million support staff, to educate over 13 million students (Figure 1 shows the number of institutions per state). In 1993-94 the funding for public institutions was almost $100 billion and the funding for private institutions was a little over $57 billion. The state funds for higher education operating expenses totaled $40.7 billion and the total federal spending on college and university-based research and development was almost $11 million (1994 Almanac). Rhoades described higher education in the following:

> About 45 percent of the 3,331 institutions of higher education are public, and they employ about 71 percent of the roughly 741,000 faculty and enroll about 78 percent of the over 13 million students in higher education. Most of these public institutions (about 61 percent) are unionized (1993).

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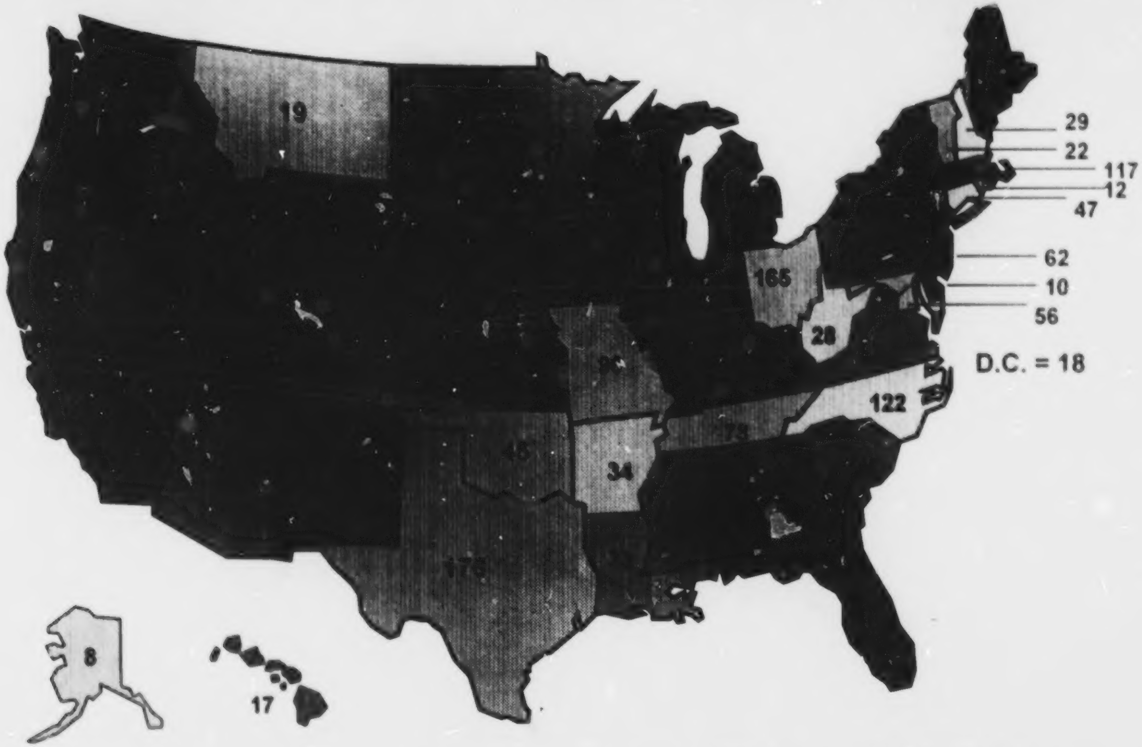
[1] The views expressed in this paper are those of the author and do not necessarily reflect the position of the National Education Association.

Figure 1. Number of Colleges and Universities, 1992-93


19
165
28
96
46
34
73
122
175
8
17
29
22
117
12
47
62
10
56
D.C. = 18

Source: Chronicle of Higher Education 1994 Almanac

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There are thirteen states that spend in excess of $1 billion dollars per year on public higher education which SHEEO has defined as the "Megastates." (Figure 2) These states also have large populations and significant industrial wealth and business activity. With the exception of four southern states, Alabama, Georgia, Texas, and North Carolina, the Megastates have large numbers of faculty and are organized by the unions.

Each year our higher education institutions are flooded with students from different countries. In 1992, students from 193 countries were enrolled in America's colleges with Asia leading the way. America's universities and colleges are the "envy of the world" with, at least in the past, access for all economic levels, while most European and Asian universities provide an elite service to a privileged few (Smolowe).

And yet, the stresses and strains that have been placed on higher education in the last decade threaten its viability and quality. At a time when the demand for higher education is increasing, there have been significant cutbacks in funding, forcing institutions to lay off faculty, defer maintenance, and deny access to students. Why should we be concerned about the funding of higher education?

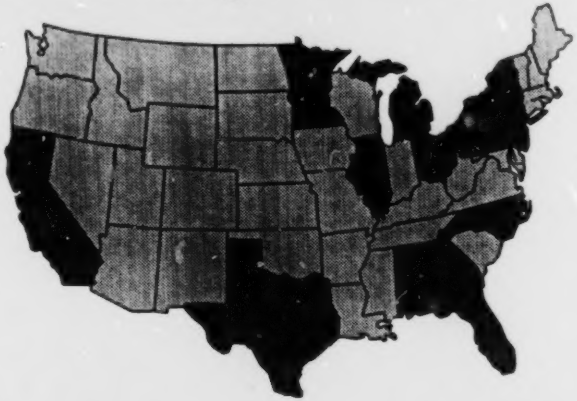
First, the nation's economy is dependent upon an educated work force. America's leaders must recognize that the linchpin to long-term economic growth lies in education. States with strong post secondary institutions are more competitive at attracting corporations and businesses that require highly skill employees. As an example, "several commission and countless authors have pointed to the close connection between the San Francisco Bay Area universities and the success of Silicon Valley in California" (Ogilvy, 1993). In 1990, twenty-three percent of the adult population in California had a bachelor's or higher degree and the per capita income was $21,821. The national average for adults with a bachelor's or higher degree is 20.3 percent and the per capital income in 1990 was $20,817. In New Jersey the percentage of adults with bachelor's or higher degree in 1990 was 25 percent and the per capita income was $26,967; in New York the bachelor's degree or higher was 23 percent and the per capita income was $24,623 (1994 NEA Almanac).

Competing in a global economy means that high-volume, standardized production will no longer provide the productivity gains needed to maintain our standard of living. Beginning in the 1960s and "continuing to the present day, the cost of sending things or information around the globe has fallen dramatically" which means it is no longer necessary to produce goods close to the point of consumption (Reich, 1988). Two decades ago international trade was not a factor in the American market; today, "more than 70 percent of the goods we produce are actively competing with foreign-made goods." If we are to maintain our standard of living, America's competitive advantage "must shift toward work whose value is based more on quality, flexibility, precision, and specialization than on its low cost" (Reich, 1988).

Figure 2

The Megastates

- Alabama
- California
- Florida
- Georgia
- Illinois
- Michigan
- Minnesota
- New Jersey
- New York
- North Carolina
- Ohio
- Pennsylvania
- Texas



Highlights:

- Appropriate more than $1 billion per year to their higher education systems
- Large populations, significant industrial wealth and business activity
- Large systems of higher education
- California leads the nation with almost $5 billion appropriated in 1994
- Texas and New York appropriate a little over $3 billion
- Six states cluster between $1.5 and $1.9 billion -- Illinois, North Carolina, Florida, Michigan, Pennsylvania, & Ohio
- Four states are close to $1 billion - New Jersey, Georgia, Minnesota, & Alabama

Source: Illinois State University, 1994.

America has the choice of two paths in the global economy -- the first path is toward stable mass production which requires cutting labor costs, massive layoffs, moving companies to lower-wage states and countries, and rapidly diversifying products and services. For workers, it means wage concessions, periods of unemployment, and part-time work with no benefits. The second path involves increasing the value of labor, investing in training for workers, giving workers a stake in increased productivity. It means restructuring work from the hierarchical arrangement to work that is done collaboratively in teams. It also relies, above all, on a work force capable of rapid learning and critical thinking (Reich, 1988).

The old system of education mirrored the old organization of production: most people spent eight to twelve years of their childhood training for jobs that consisted of repetitive tasks and required workers to be reliable and disciplined. They were "cog jobs" according to Reich. An "elite few were trained for top policy and planning positions."

If we are to take the second path toward higher-value production we must continue to reform education. Students must be prepared to think critically and to learn continually on the basis of new data and experience. In the new economy, education cannot be based on the model of the first path. Rather, students must be motivated to love learning, to be able to work collaboratively in teams, and to relearn as their careers change. If education is modeled after a long list of facts that "every adult should know" and standardized tests, we run the risk of producing robots adept at Trivial Pursuit, but unable to "think for themselves and to innovate for the future" (Reich, 1988).

Second, on a broader historical scale, the relative influence of different cultures can be correlated with the excellence of their universities. Consider Oxford and Cambridge, Heidelberg, the Sorbonne, Harvard and Yale, and Tokyo University. "World-class cultures maintain and are sustained by world-class universities" (Ogilvy). Clark Kerr noted that "beginning with World War II, there has been an increasing correlation between the quality of the educational system and both national power and regional development, particularly through science and technology based on science. The United States has moved into a clear first place in numbers of leading scientists. From 1901 to 1918, five percent of the Nobel Prize awards went to Americans; from 1946 to date, the percentage is 40 (1991). Such an effort is only maintained by national support for our academic researchers. In recent years, there has been much criticism of the time that faculty spend on research. This is very shortsighted, if we are going to remain competitive in the global economy.

In 1993, the American Council on Education issued a Research Brief entitled, "Developing Our Future: American R&D in International Perspective." The money that a country spends on scientific research and development (R&D) has "long been seen as a vital component of a nation's economic strength and international standing." It is also an "indicator of a country's commitment to scientific and technological development and its readiness to invest in innovation and improvement; and it is "recognized as a direct stimulus to a country's growth rate and standard of living." Figure 3 compares the national expenditures for R&D in the United States with four other countries. The U.S. is the leading nation in terms of the total amount spent on R&D activities and devotes more resources to R&D than the other four countries combined. However, when the number is computed as a percentage of the gross national product (GNP), then the United States lags behind Japan and Germany. In the mid-1960s the United States had the highest ranking on this measure. In each country, industry spends the most on R&D activities. In 1989, the industry proportion ranged from 72 percent in the United States and Germany down to 60 percent in France. Government agencies also spend money on R&D activities (in the United States the government accounts for 11 percent of the R&D compared to France with 24 percent and Japan with 8 percent).

Academic institutions are an important component of the R&D activity, because they are the major contributors to basic research, i.e. "research directed toward new concepts or knowledge." In the United States higher education accounted for 14 percent of R&D expenditures. Japan had the highest share of R&D conducted by universities with 18 percent.

Another measure of a nation's R&D capacity is the proportion of a country's total labor force that is engaged in R&D activity. Figure 4 shows the number of scientist and engineers engaged in R&D per 10,000 persons in the labor force. Japan and the U.S. have a similar rate of R&D scientists and engineers in the labor force. This reflects rapid growth in the R&D cadre in Japan over the last 20 years. Germany and France have also increased the numbers of scientists and engineers in the labor force. The U.K. has had a smaller increase. In the coming decade the numbers of scientists and engineers will dramatically increase in six Asian countries - China, India, Japan, Singapore, South Korea, and Taiwan, based on the numbers of bachelor's degrees being awarded in 1990. These countries awarded three times as many bachelor's degrees in the natural sciences and engineering as the United States. About 20 percent of the U.S. doctorates in these disciplines went to students from these countries in 1990.

The conclusion is clear -- if the United States is going to compete successfully in a global economy, we cannot afford to decrease our financial support for research and development, nor can we afford to diminish the role of faculty in this activity.

Third, broad access to higher education through a system of two-year community colleges provides a pathway to success for individuals whose back-grounds might otherwise limit their achievement. Without this access to community colleges in states like Massachusetts, California, and Michigan the promise of equal opportunity is hollow. The community college is unique to the United States, and it has been "extraordinarily successful." From the beginning these campuses have often been called the "people's colleges." The "more elitist institutions may define excellence as exclusion, community colleges have sought excellence in service to the many. While traditional institutions too often have been isolated islands, community colleges have build connections beyond the campus" (Commission on the Future of Community Colleges).

Higher education in the United States was made accessible after World War II when the G.I. bill made funding available to returning soldiers. As universities expanded to handle this influx, they "developed the flexibility that has become one of the hallmarks of American higher learning." People can go back to college at any age, they can train for new careers, or upgrade within a profession (Smolowe).

Fourth, the future promises to punish ignorance even worse than in the past. It is now commonplace to speak of a series of ages: the agricultural, the industrial, and the information ages. We passed from the Industrial Age into the Information Age in 1991: the year that corporate spending on information technology surpassed corporate investment in manufacturing technology according to a recent report in Fortune (Green and Gilbert, 1995). What the farm was to the agricultural age, the factory to the industrial age, education institutions are to the information age. Namely, the means of production and manipulation of the principal production of society -- knowledge. But the price of entry into and competitiveness in the new age is education. Neither illiterate farm workers nor minimally trained industrial workers can function successfully as producers or consumers of the best an information economy has to offer. A good education will be more critical to success in the future than it ever was in the past (Ogilvy).

Americans think a college degree is the "ticket to a better life." In a recent Gallup Poll, 73 percent of the respondents said it is very important to get a college degree (Chronicle of Higher Education, 10/16/91). In July 1994, the Census Bureau released a report that showed that "the higher the academic degree, the higher the earnings over the course of a lifetime." The average lifetime earnings of a high school graduate total $821,000 compared to a person with a bachelor's degree whose average lifetime earnings total $1,421,000, someone with a professional degree such as medicine or law, can expect to average $3,013,000 over a lifetime (Lee).

Industries now prefer people with at least two years of college. "The need for a better educated workforce -- is a relatively new phenomenon in the United States." The percent gap in pay between a thirty-year-old male high school graduate and a thirty-year-old male college graduate increased from 15 percent in 1973 to 50 percent in 1989, "not because the college graduate's pay had gone up ... but because the high school graduate's pay had gone down" (Quality or Else, 1991).

FEDERAL FUNDING

Now let us examine the fiscal challenges facing higher education. Traditionally, public higher education institutions have received funding from federal, state, and local sources. The federal government funds student assistance programs such as Pell Grants and the Guaranteed Student Loan Program. The federal government also funds research and development through agencies such as the Defense Department, Energy Department, Agriculture Department, NASA, National Institute of Health, NEH, and NEA. The amount of money spent on research is more than 50 percent of the total spent by the federal government on higher education.

This year the House Republicans in Congress are seeking to cut current year appropriations. They are proposing cuts in programs such as the AmeriCorps which allows high school students one or two years work experience to earn tuition dollars; the TRIO initiative, a group of programs for low-income students entering college or graduate school; postsecondary scholarships and fellowships; and college housing loans. It is not known how the Senate will vote on these cutbacks. When Congress begins cutting appropriations from future funding other areas that are likely to be cut are Pell Grants, interest subsidies on student loans, the student loan programs, and administrative overhead on federal grant money.

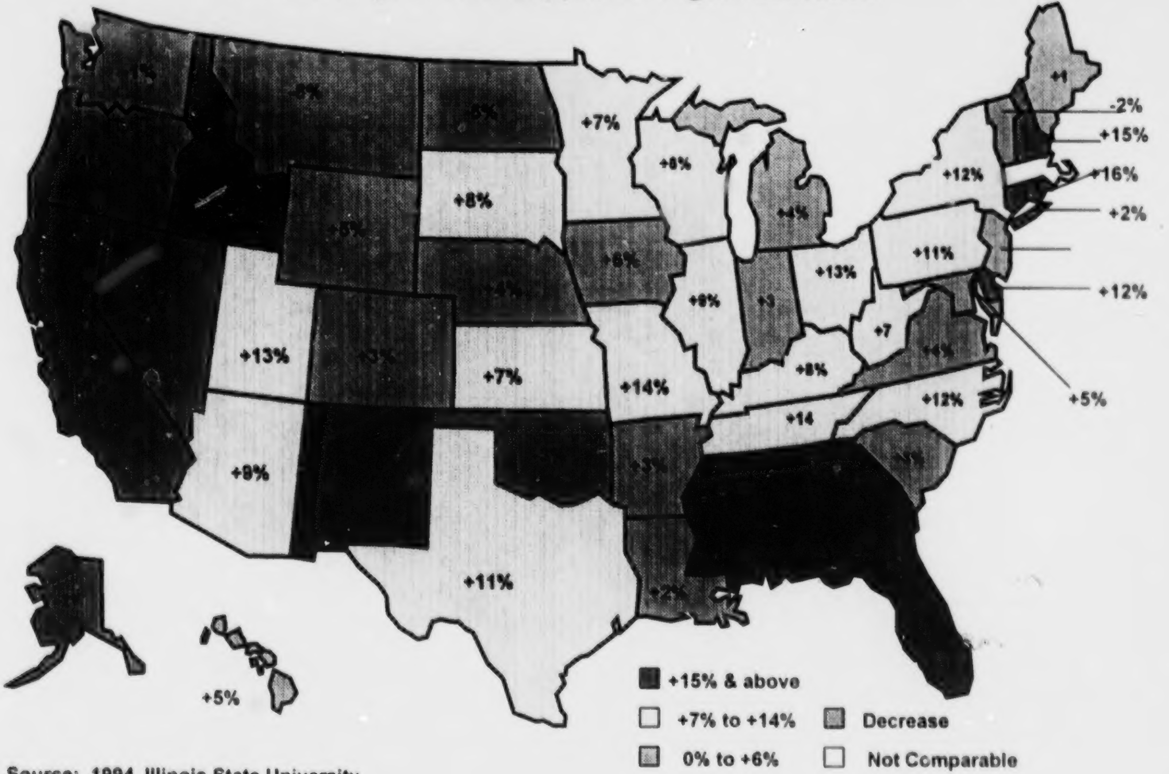
STATE FUNDING

In the states, the fiscal pressures on higher education have eased somewhat. The 1994 report from Illinois State University notes that higher education received the largest increase in state support since the recession began. "States will spend $42.8 billion on public colleges and student-aid programs in 1994-95, an increase of 7.6 percent since 1992-93" (SHEEO). The increases do not restore spending appropriations to the "robust increases of the mid-to-late 1980s." Figure 5 shows the two year change in state support for higher education. The lost fiscal ground was not recovered in 1994-95. During FY92, and FY93, state support for higher education was at its lowest levels of increase since the late 1950s. In FY93, state support for higher education declined nationally for the first time. The most recent two years, FY94 and 95, have had modest increases. Figure 6 shows the history of state appropriations for higher education from 1975 to 1995. The AASCU Annual Report of the States concludes: "Times are not as bad as they have been recently nor as good as they were before."

More troubling is the loss of higher education funding in relationship to other state programs. Campus Trends 1994 notes that there has been a drop in the share of campus operating budgets that are covered by state funds. Five years ago, state funds accounted for 56.6 percent of operating budgets in higher education compared with 50.5 in 1994. Further, when compared to other functions in the state budgets higher education has declined the most (Figure 7). Unfortunately, because funds for higher education are discretionary, higher education is viewed as the budget balancer in many states. Again, the country is being shortsighted in its approach to funding education. When compared with money spent on prisons, or Medicaid, the one with the return on investment is education.

At the same time, higher education faces increased demands for services and accountability. The number of high school graduates is projected to grow by 34 percent between 1991-1992 and 2007-2008 (Zumeta, 1995). Higher tuitions have

Figure 5
2-Year Change in State Support for Higher Education


+7%
+8%
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+15%
+16%
+2%
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+5%
+8%
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+11%
+8%
+3
+7
+8%
+4%
+14%
+12%
+14
+3%
+2%
+5%
+13%
+7%
+8%
+11%
+5%

+15% & above
+7% to +14%
0% to +6%
Decrease
Not Comparable

Source: 1994 Illinois State University

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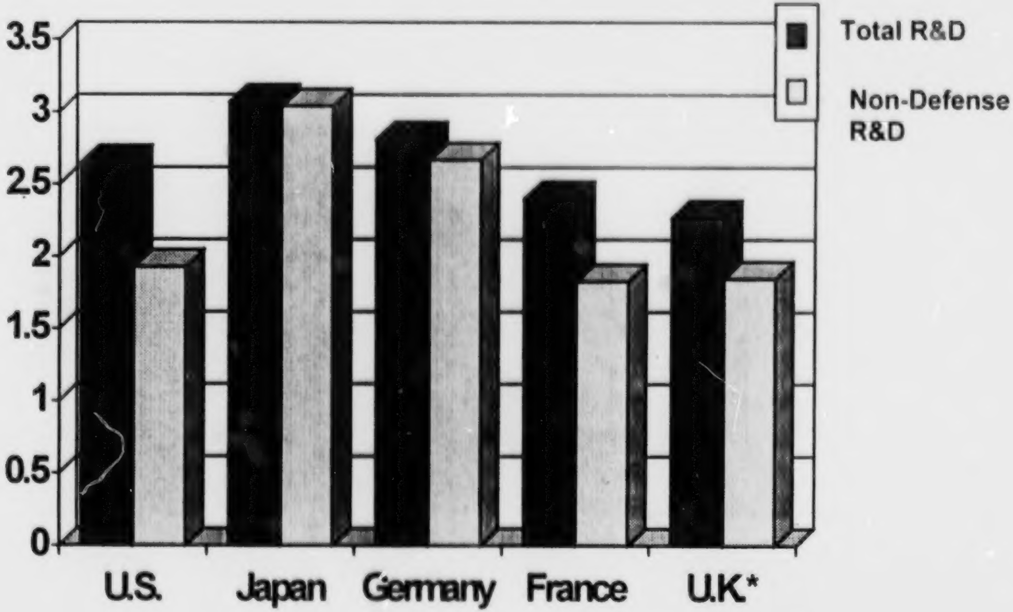
Figure 3

National Expenditures for R&D as a Percentage of GNP, 1990

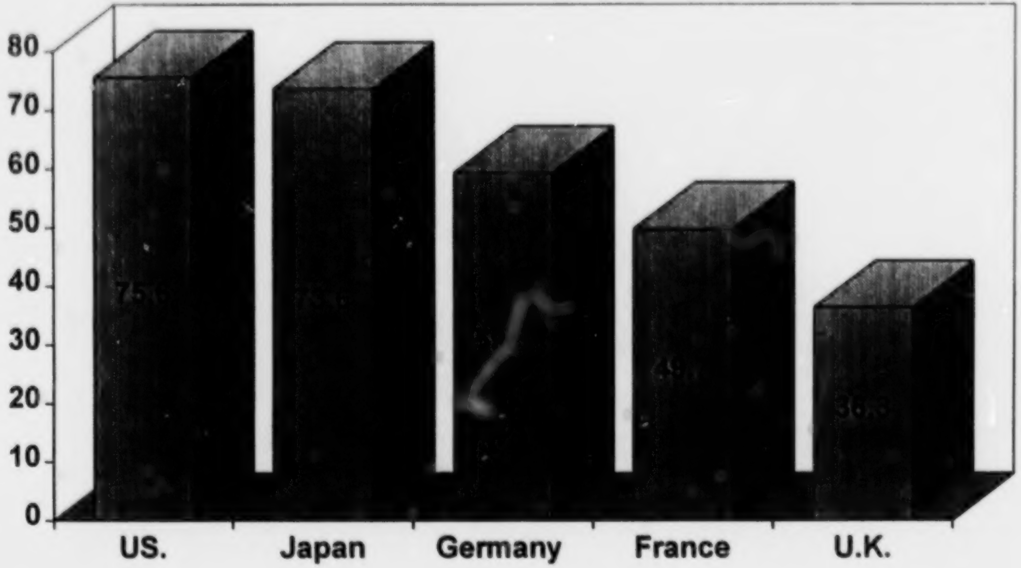


*1989 Data

Source: American Council on Education, 1993

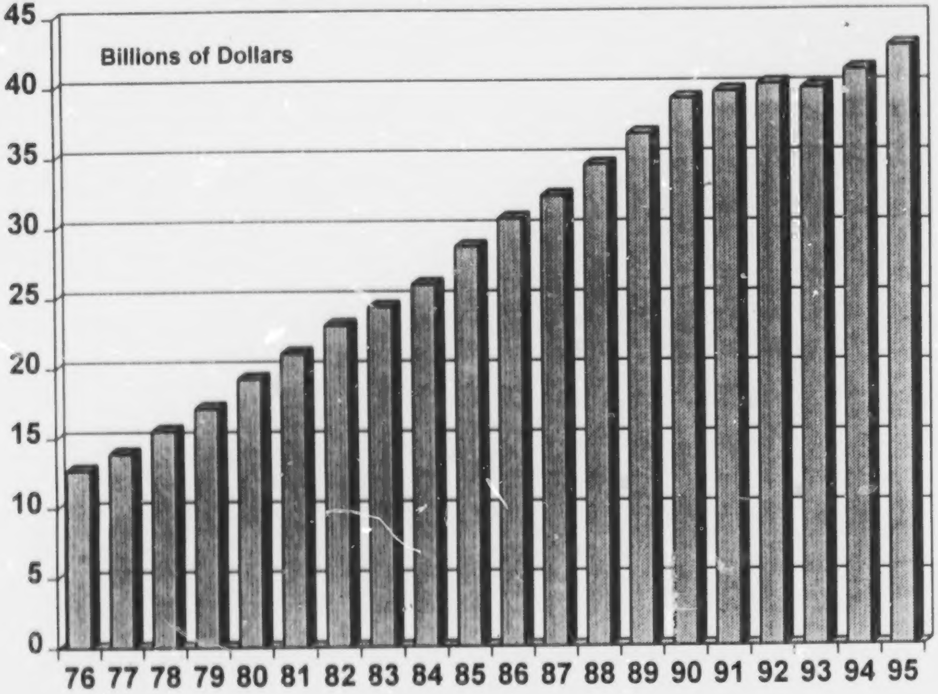
Figure 4

Scientists and Engineers Engaged in R & D per 10,000 Persons in the Labor Force



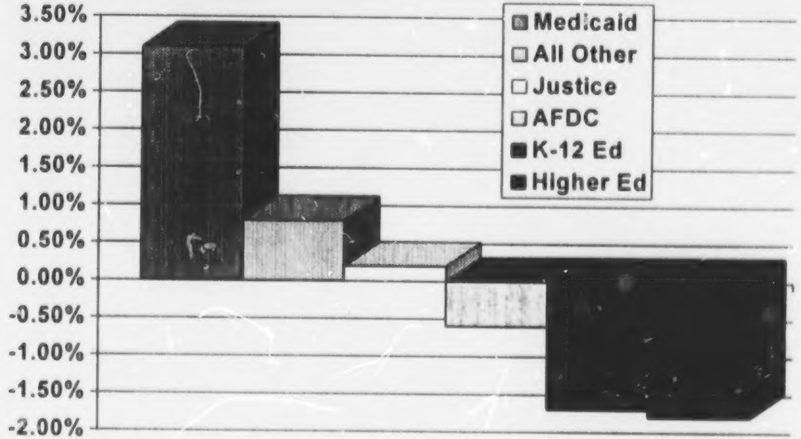
Source: America Council on Education, 1993

Figure 6
State Appropriations for Higher Education 1975-95



Source: University of Illinois, State Higher Education Appropriations 1994-95

Figure 7
Change in Share of State Budgets by Function: FY 1990 to FY 1993



Highlights:

- o On average, higher education spending as a percent of state general fund budgets has declined the most of all functions since FY 1990.
- o In FY 1993, state spending on Medicaid as a percent of state general fund budgets surpassed higher education for the first time ever.

Source: National Conference of State Legislatures Annual Survey created problems with access. "Caught trying to meet growing demands for service with limited resources, elected leaders turned to stop-gap measures -- budget cuts, restricted access, and 'accountability' mandates (Zumeta, p. 74). The Campus Trends 1994, reports that restructuring is widespread, with two-thirds of the campuses reporting that administrative structures have been reorganized, 71 percent have reviewed their mission of their academic programs, one half have reorganized academic units, 40 percent have consolidated some programs, and two-thirds have created new academic programs.

It is clear that continuing to fund higher education in its current form will lead to further budget cutbacks. The plans to balance both the federal and state budgets without tax increases, and in some instances tax cuts, will produce further fiscal pressures on higher education.

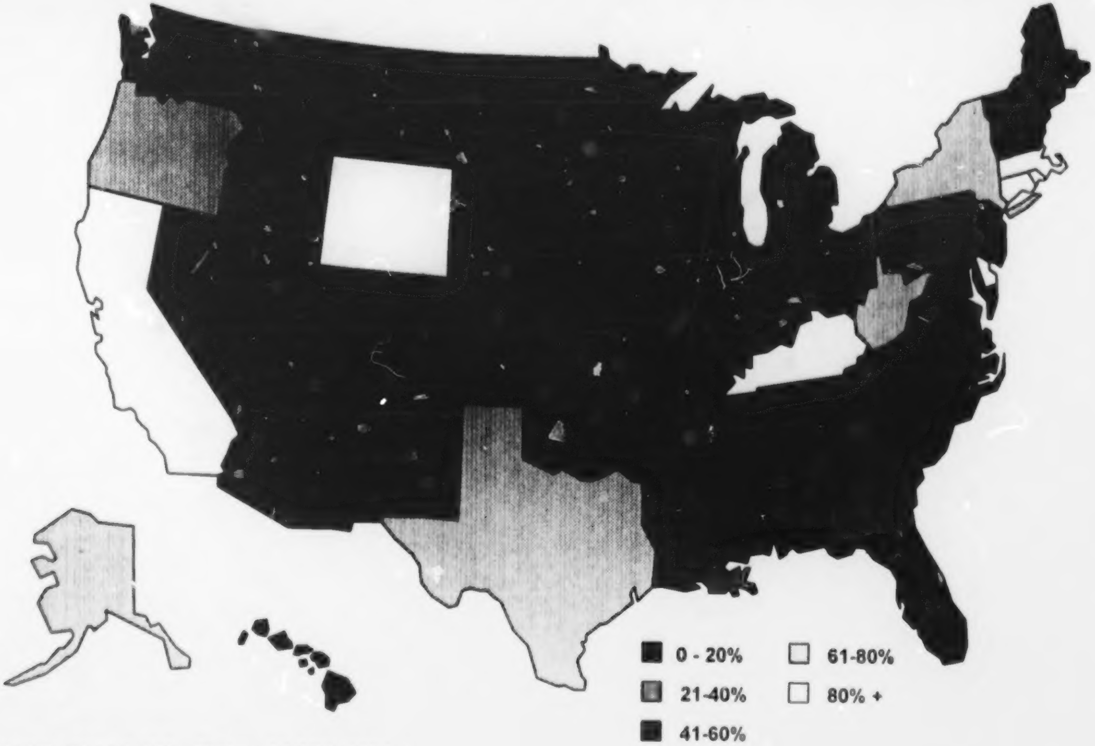
ISSUES OF ACCESS

The fiscal crises is having a negative impact on access to college. After two decades of federal student assistance, college attendance rates are still directly linked to income level. The General Accounting Office reports that individuals from higher income levels are four times as likely to enroll in postsecondary programs as are individuals from the lowest-income levels. The top private colleges are cutting back on the practice of "need-blind" admissions. As a result, middle-class students who get accepted, but cannot afford the tuition, are choosing other colleges, and the elite schools appear to be "returning to their earlier 20th century days as bastions of the rich" (Washington Post, 4/26/92). According to McPehrson and Shapiro (1991) as the upper-middle income students fill major public universities, they are crowding out less well-off students who are being funneled into community colleges. Participation in higher education by low-income students declined from the mid-1970s to the mid-1980s. The authors conclude that the changes in student aid that occurred in the early 1980s contributed significantly to the lower enrollments.

Middle income families are increasingly hard-pressed to meet spiraling tuitions. Between 1980 and 1988 the cost of a four-year public higher education rose nearly 34 percent, while the median family income increased only 6.7 percent in constant dollars (College Board). Figure 8 shows the cumulative increases in tuitions at four-year campuses between 1988-1993.

The issue underlying the cost of a college education is the question of whether it is a public or a private good. If it is a private good then the state policy of increasing tuitions and making the individual students pay more will continue. States have been "shifting the cost of higher education from appropriations to tuition" in over 80 percent of the states. But on the "near horizon is an increasing pool of high school graduates, a pool that will continue to increase into the first decade of the next century," a pool that is increasingly minority and female Will there be the "political will to provide access to this new wave" of students? The high tuition/high aid strategy is flawed, because the high tuition does not guarantee

Figure 8. Cumulative Tuition Increases at Public, Four Year Colleges, 1988-93


0 - 20%
21-40%
41-60%
61-80%
80% +

Source: Report of the States, AASCU, 1994 high aid. "Legislators are avoiding their responsibility to provide for the common good through a strong public higher education system and electing to transfer the financial burden to the student" (Report on the States).

Who benefits from higher education? A basic assumption is that the taxpayers and the students are the main beneficiaries and should therefore pay for higher education. But others who benefit are the business and corporations who hire the skilled employees. Corporations spend billions on training programs -- $44 billion in 1989. Some higher education institutions are tapping into that money by meeting corporate needs through programs such as tuition-assisted plans, employer-sponsored programs, cooperative programs between community colleges and businesses. Corporations also fund research and development on campus. Institutions, like MIT, have long depended heavily on corporations to support their research laboratories, and corporations have depended on universities to do some of their research and development.

Public higher education is learning to live in a climate of decreasing public support which has resulted in fewer faculty and staff and higher tuition and fees for students. It also means fewer class offerings and students denied access because of enrollment caps. These problems have "contributed to a rising tide of criticism of higher education" and have "exacerbated problems of affordability and access -- the very concerns that have fueled criticisms about accountability, faculty workload, and program duplication." From a fiscal point of view funding has improved, but from a political perspective, support for higher education has eroded and there has been a "substantial loss of the sense that public higher education contributes to the public good" (Report of the States).

Clearly, if the United States is to remain competitive in the global economy, it will be necessary to continue funding higher education and providing financial assistance to disadvantaged students. The Department of Labor estimates that workers will change careers three times and jobs at least seven. Employers and colleges will need to form linkages to educate the workforce of the future. Citizens will be engaged in lifelong learning and higher education is a vital link in that process.

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FUNDING HIGHER EDUCATION

C. FISCAL REALITIES IN HIGHER EDUCATION

Gordon K. Davies, Director
State Council of Higher Education for Virginia

I was very pleased to be invited a few years ago to participate in this annual conference, and, needless to say, am particularly pleased to have been invited back. Nonetheless, I must confess that it strikes me as ironic to be invited to appear before you, coming as I now do from a strong "right-to-work" state. The Commonwealth of Virginia never has met a union it liked, including the Union army led by General Grant.

But I grew up in and around New York City, and neither my grandfather or my father would cross a picket line. So, perhaps, I am not entirely a stranger in a foreign land.

I have been asked to spend a few moments this afternoon discussing higher education funding. Being involved in the coordination of a state system of colleges and universities, I am going to take a state perspective. But I think that there is something here for just about everyone, regardless of the kind of institution you represent.

Put briefly, my assessment is that American higher education is in for a tough time. Governments at all levels are under great pressure financially and, particularly at the state and federal levels, there is a political agenda that only can increase the pressure. Let me focus on the states for a moment to expand upon this point.

The problem is twofold: expenditures that take priority over higher education and determination to cut taxes. I emphasize that the problem is not revenue growth. In fact, as best I can tell, revenue increases are modest, but fairly steady in most states; in some, they are quite strong.

But our spending priorities are focused on corrections and public safety, on health care in the form of Medicaid, and on K-12 education. In Virginia, Medicaid spending passed higher education last year. If increases continue as projected, corrections spending will pass us in two years.

A couple of years ago, I spoke at a legislative work conference of the Southern Regional Education Board, (SREB), a fifteen-state compact well known for its progressive contributions to education in the south. I asked legislators from the fifteen states to tell me the priorities for spending in their states and I wrote them down on a flip chart. We got through 11 items and higher education had not been mentioned. I am not kidding you. Finally, one legislator said, "If this is a meeting about higher education, we probably should put it on our priority list." I wrote it in as number 12.

Toward the end of the meeting, a senator from Kentucky raised his hand and said to me, "Gordon, what you have to remember is that we are your friends." He was right; the legislators at that meeting were the ones who have been identified over the years as the strong supporters of education in their states.

The growth rate of Medicaid expenditures seems to be slowing, as managed care becomes the fundamental component of health care delivery systems. But corrections expenditures, accompanied by "Three Strikes You're Out!" and "No Parole," respond to a deeply rooted fear in our nation today. We are a small state compared, say, to New York or California. But with an annual budget of about $16 billion, our governor is proposing to build additional prisons that will cost $2 billion.

People are afraid. They are afraid of bodily harm to themselves, their children, and others whom they love. They are afraid that their possessions will be stolen or trashed. And the fear extends beyond that. They are afraid that their pensions are not secure, that their health insurance can be taken from them, that their children will not enjoy better lives than their own.

Last year, we did polling and focus groups throughout the SREB states to learn how people felt about higher education. Generally speaking, we found broad but thin support: a mile wide and an inch deep. But two themes emerged again and again, both of which reflect fear. Respondents were no longer sure that higher education would provide their children with access to a good job and a secure life. Second, they feared that they would not be able to afford the price of higher education when it came time to send their children to college or university.

So fear is abroad throughout the land and it affects all institutions including the colleges and universities in which we work and for which we are responsible. Concern for physical safety is dominant at this time and we see our elected representatives "getting tough on crime." But we also see, and justifiably so, caps on tuition and renewed emphasis within higher education upon cost containment, constructive change, and quality assurance.

In Virginia, we have embarked on a restructuring program in which each institution has devised a plan that will enable it to accommodate more students as enrollment increases, to improve the quality of its offerings, and to reduce the unit costs of its operation. I believe that this restructuring program will result, in the coming decade, in colleges and universities that are different from and stronger than the ones we have today.

I believe this, but I know that restructuring in Virginia is an unqualified political success. It has removed from legislative debate most references to lazy faculty, useless research, bloated administrations, and all the other evils that have been attached to us in recent years. Most members of our General Assembly now are convinced that we ourselves are addressing the issues of efficiency and effectiveness. Many have become genuinely interested in the revolutionary notion that the right way to define productivity in higher education is "learning divided by cost," as opposed to "credit hours per full-time-equivalent faculty."

But on top of the chronic revenue scarcity that higher education can expect as a result of spending priorities, we also have the tax cut frenzy. In our last legislative session, which concluded February 25, the General Assembly of Virginia considered proposals to build $2 billion worth of new prisons, as I have already said, and also to cut taxes by $2.1 billion. Remember, that Virginia's annual budget is about $16 billion. This tax reduction, had it been enacted, would have resulted in enormous cut throughout the discretionary parts of Virginia's budget. And I need not tell you that higher education is the largest "discretionary" expenditure of all.

These cuts, created not because of declining revenues, but out of a strong conviction that there simply is too much government, would come on the heels of a $400 million state disinvestment in higher education that occurred between 1990 and 1994 during the recession.

Even in a relatively low-tax state like Virginia, the tax cut frenzy is not going to go away. In addition, we have about reached the limit on what we can charge parents and students. And while I do not know the demographies of the states from which you come, about half of the states expect significant increases in enrollment demand during the next ten to fifteen years. All of this adds up to "excedrin headache number 47."

Headache number 48 comes if Congress, in its budget-balancing, tax-cutting zeal, freezes or reduces funding in the federal financial aid programs and eliminates the in-school interest subsidies for student loans.

Given all of this, what can we do? I suggest three things.

First, we can -- we must -- undertake programs such as the restructuring in Virginia that I have already described briefly. There are different ways to organize our activities, different ways to deliver instruction, different ways to go about the business of learning. The new technologies will play an important role here, but the important task is to re-think what we are doing from the ground up. We can and have created awesome amounts of knowledge and technology. It is imperative that we examine our own institutions as carefully as we study the world around us. We should turn a dispassionately analytic eye upon our own institutions and create them anew.

Second, we have to fight against the notion that we are, indeed, a "discretionary" item in the budget. We have to argue that funding us adequately is critical for the economic well-being of our entire society. We need to enlist the support of business leaders to help us stress the importance of educated, skilled, intellectually capable workers to a technologically advanced economy. We must, in short, get on the economic development horse and ride for our lives.

By way of emphasis, let me give you an example. It is no longer adequate to say that we need salary increases or our best faculty will leave; neither is it adequate to say that we need equipment so our faculties can conduct their research. These arguments are self-referencing; they boil down to asking for money so that we can keep doing what we want to do.

But they can be re-shaped if we emphasize that we need financial support in order to do what is good for -- what is essential for -- this nation to compete effectively in global markets.

Michael Hooker, president of the University of Massachusetts, has stated that the mission of the university is economic development; that the institution, like all others, finds the justification for its being outside itself rather than within.

Third, and finally, we should articulate a set of moral purposes for higher education because, while we are about the business of economic development we are not just about the business of economic development. We can articulate the moral purposes of higher education in ways that are empirically grounded and that build upon the practical emphases we have placed upon higher education in recent years. In this way we can avoid becoming involved in a doctrinaire shouting match.

We have ceded the moral high ground to our shrillest critics. They talk about timeless truths; we talk about economic development. They denigrate thinking in favor of knowing; we pledge to become more efficient. They say that broad access has destroyed intellectual rigor; we avoid systematic assessment of our graduates.

The ceding of the moral high ground had occurred in other areas of our public lives as well. Having failed, for instance, to hide sex education under the euphemism "family life," we argue that it will help to prevent AIDS and teen pregnancy; our critics say it is immoral. We try to be practical; they know they are right. In the introduction to God and Man at Yale, William F. Buckley wrote something like this, if I remember correctly: "I am writing this book because we are right and they are wrong. I am writing it with a great sense of urgency because they are winning and we are losing." They still know they are right, but now they are winning and we are losing.

I am proposing an empirically grounded moral position, not an empirically verifiable one. The grounding I have in mind consists of polls that show the extent to which the American people count on higher education as a means to better lives an the extent to which they fear that higher education can no longer deliver. It consists of research that shows the increased earning power of persons with college educations and the tax implications of those increased earnings, and of studies that show the effects of university research upon the quality of our lives.

We might stake out a position focused on moral responsibilities: each of us for our children and families; individuals' for the common good; institutions' for the society as a whole; and each generation's for the future generations. From these notions of responsibility, we can describe the roles of government and the missions of colleges and universities. From the truly Jeffersonian conviction that each human being deserves equal opportunities, we can justify the notion that higher education should be available to all Americans who want and can benefit from it.

There is ample evidence that people believe in higher education and that they want its benefits for themselves and their children. There is ample evidence that there really are benefits. And there is evidence that Americans remain generous in their support of the notion of equal opportunity. We need to articulate a moral position that can help all of us be better than we are.

V. ACADEMIC FREEDOM AND SEXUAL HARASSMENT

A. Dealing with Sexual Harassment in the Academic Environment

B. Sexual Harassment and Academic Freedom: A Faculty Union Perspective

C. Sexual Harassment and Academic Freedom

ACADEMIC FREEDOM AND SEXUAL HARASSMENT

A. DEALING WITH SEXUAL HARASSMENT IN THE ACADEMIC ENVIRONMENT

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When a professor offers a grade increase to a student in exchange for sexual favors, this is sexual harassment. In the most typical example, a male professor tells a female student that the only way he will write the recommendation she needs for graduate school is if she will meet him after hours and demonstrate her gratitude. These two examples constitute what is referred to as *quid pro quo* theory of sexual harassment, you do this for me and I will do that for you. It is direct, one-on-one and demonstrates a misuse of the power inherent in the student/teacher relationship.

There are some murky aspects to *quid pro quo* in sexual harassment cases such as proving what is only implied by example two. However, higher education administrators and the American Association of University Professors (AAUP) agree that proposals for sexual favors made under any circumstances which imply one's response might affect academic decisions, are forbidden by members of the academic community (1, 2).

Academic *quid pro quo* sexual harassment parallels laws coming from the typical workplace and reviewed by the courts. But academia is struggling with the courts' second form of sexual harassment which is depicted by the term " hostile environment". Hostile environment harassment has been weighed against free speech in the classroom (3). This free speech, or academic freedom, is the cornerstone of the profession and is essential to the pursuit of knowledge and learning (4).

Examples of the need to defend academic freedom include the case Leo Koch, who was dismissed from the University of Illinois in 1960, for publishing a letter in a student newspaper condoning premarital sex; Scott Chisholm, who lost his job for burning the American flag while teaching the difference between a symbolic act and a physical one, at Indiana State University in 1967; and Angela

Davis, in 1970 at UCLA, who was denied reappointment in part because she wished to deny others the right to express certain racist and loathsome ideas (3,5).

Regardless of your personal response to the above professors' actions, there certainly is a need to protect their right to make counter-culture statements. It is the role of academics to enhance thinking by exposing students to all manner of ideas without censor. The history of academic freedom is the history of protecting speech that was, at the time it was uttered, found to be deeply offensive by members of the community (3). The learning must be open. Faculty have the right to challenge and to be provocative.

As a psychologist and a professor in an allied health school at the University of Connecticut, I am required to discuss human sexuality and other personal issues in class. Occasionally, I use humor to illustrate points in all aspects of my teaching. It is possible that one or two students are annually "offended" by my jokes. If these jokes are related to my subject matter and only occur in that context, I am using a pedagogical technique. I feel secure in my judgment of what is good material from which to teach and believe it is my right to make such classroom decisions. It is also my responsibility to see that this course material facilitates learning.

But male colleagues may be more at risk. Perhaps my male counterparts must be even more circumspect in their choice of humor (6). Those who teach literature, history, biology, journalism, psychology, poetry, law, drama, health, physical education, marketing, art and management must certainly cover issues related to human sexuality. Are these professors now disabled in their teaching by the fear that they will repeatedly be offending students and creating a hostile environment for learning? This is the fear of many in the academy. It is referred to as a "chill" on academic freedom (7).

This "chill" on academic freedom is being measured against a "chill" on learning. For many women the classroom has been a place where they are demeaned, their abilities, and their future role are belittled. This can be subtle as when only male graduate students play golf with their male professors and have advanced information about jobs or grants (which is sexism but not harassment) to the creation of an environment in which one gender is always favored and another ridiculed such as medical school lecturers repeatedly using Playboy centerfolds as overheads during lectures.

Impaired or marginal faculty need help. There is a difference between radical ideas/zestful language and speech and behavior which is aimed at tearing a group down. If a professor targets harassment at one student, we feel more comfortable since this conforms to *quid pro quo* behavior. But individuals may be targeted as members of a group or a whole group may be badgered. The courts acknowledge that a hostile environment for sexual harassment may be created. Therefore, administrators write policy to protect and govern even within ivy covered walls. A hostile environment for sexual harassment is difficult to prove.

But many of us have experienced this environment and certainly there are numerous examples in the literature. We all have a responsibility for combating this environment. Think of a classroom in which women students are reluctant to raise their hands, to ask questions for fear of ridicule. This is not an open environment for learning; it is the exact antithesis of academic freedom.

But does this mean that they seek a list of forbidden terms or words? We know what would become of such a list. It would be ridiculed, sidestepped and jumped over. The great "academic sport" would be to find even more offensive, alternative expressions and to use them in the classroom. Suggestions have been offered that misconduct such as creating a hostile environment might be a form of behavior which could be sanctioned under the AAUP's guidelines for "unprofessional behavior". Unprofessional behavior has not traditionally been viewed as encompassing a standard for sexual harassment. But more to the point, "unprofessional behavior" standards are no more clear or specific than the regulations offered for sexual harassment, hostile environment.

While in some cases overzealous administrators may be writing poor sexual harassment policy, let us work with them to find solutions. Before a case is actionable the courts look for tangible psychological harm from the sexual harassment occurring in the workplace as described in the now classic case of Meritor Savings Bank v. Vinson (8). In Harris v. Forklift Systems, Inc., the Meritor opinion was elaborated. "The challenged conduct must be severe or pervasive enough 'to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive'" (9).

Academics need to broaden this perspective to protect both the student and the learning environment. Discussions need to focus on "severity" and "pervasiveness" with a view of appropriateness to subject matter. The unpublished deliberations of the subcommittee of the AAUP which is debating the integration of sexual harassment hostile environment and the classroom stress the following points (10). Speech or conduct must not only be offensive but create a hostile environment and substantially impair the academic opportunity of the student. It must further be persistent and pervasive and not germane to the subject matter. These points are distinctive to the classroom as latitude must be afforded to learning, which may occur with, or be stimulated by "offensiveness".

Further defining and refining of the issues becomes exceedingly more complex. None of us believes that a hostile environment for sexual harassment cannot exist in the classroom, we simply find it so difficult to define and measure that we defer from sanctioning it. Let us handle the hostile environment on a case by case basis using AAUP's definition of professionally appropriate behavior, accepting a working definition for sexual harassment hostile environment, and coupling this with sanctions following due process to ensure that the environment is correct for all students. Maybe educating the educators in the area of sensitivity or early retraining for professors who have needed warnings, is the route administrators, faculty, student advocates and insurance companies most need to promote. Just because this is difficult to measure does not mean we are free from facing it or helpless to prevent much of harassment from happening.

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ACADEMIC FREEDOM AND SEXUAL HARASSMENT

B. SEXUAL HARASSMENT AND ACADEMIC FREEDOM: A FACULTY UNION PERSPECTIVE

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I. INTRODUCTION

> Professor X begins his graduate film class by reminding his students that today they will be viewing the two homoerotic films he had told them about both on their syllabus and in class and that it was still acceptable to decide not to view these films and substitute two other films. Hearing no response, he proceeds to run the films.
>
> Professor Y starts off his fifth class in a first-year chemical engineering course repeating his message of the first four classes that he did not believe female students had a chance to succeed in this field and that it was not too late to transfer into nursing or education or some field more suitable to their intellectual capabilities.
>
> Professor Z walks into her interpersonal communication course and writes on the board in big letters: "OBSCENE LANGUAGE." She then invites her students to give her examples of what American culture would consider to be "obscene language." After about fifteen minutes the board is covered with such examples and she begins a discussion of today's assigned focus on "Power Words: What are they? How did they acquire their power? Who decides to define them, maintain them, discard them?"

These three examples illustrate the complexity of the issues surrounding the topic of sexual harassment and academic freedom. For the purpose of this paper I am narrowing my focus of the definition of sexual harassment to the "hostile environment" portion, which reads:

> ...unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature when:...3. such

> conduct has the purpose or effect of (i) interfering unreasonably with an individual's work performance or (ii) creating an intimidating, hostile, or offensive work environment (#16, p. 2).

In addition, I am narrowing my focus of the definition of "academic freedom" to the AAUP 1940 "classroom" section and the 1970 "interpretive comment" of that section, which reads:

> ...(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment....2. The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject (#13, p. 3 & 6).

Professor X had a "sexual harassment" charge filed against him by a student who claimed the two homoerotic films created a "hostile and offensive environment" which effected her so strongly that it interfered with her course work. Professor X was eventually exonerated. Professor Y continues to demean women students and no charges have been brought against him. Professor Z is presenting this paper and, after completing research on this topic, is wondering "if" and "when" she might have a complaint of sexual harassment filed against her!

II. "HOSTILE ENVIRONMENT" ISSUES

Three "hostile environment" issues seem particularly important to address when considering the topic of sexual harassment and academic freedom. One is referred to as "sexual favoritism." Sexual favoritism could be alleged by any student or group of students who believed the professor gave "preferential" treatment to other students who submitted to sexual advances or who were involved in a romantic relationship with the professor or who actively joined with the professor in creating an environment of sexual joking and comradery. The EEOC "Policy Guidance on Employer Liability for Sexual Favoritism Under Title VII (1990)," distinguishes between "isolated instances of favoritism based on consensual romantic relationships (not prohibited) and favoritism based on coerced sexual conduct or widespread favoritism (prohibited)" (#17, p. 300). The Potential dangers of this issue for academic freedom come from two directions: determination of the "perception" of students of "favoritism" and whether it is based on "direct observation" or "hearsay" information; and the fact that several institutions of higher learning prohibit consensual romantic relationships between faculty and students and include this prohibition in their sexual harassment policies.

A second issue concerns the "gender-neutral perspective." Courts generally agree that questions of conduct constituting discrimination and creating a "hostile environment" should be decided "objectively and without reference to the particular sensitivities of the complaint." The "reasonable person" test requires the fact-finder to adopt a gender-neutral perspective to judge conduct so that, as in the case Rabidue vs. Osceola Refining Co. (1986), the fact-finder would hold that "crude language and sexually oriented posters would not be considered to interfere with a 'reasonable' person's work performance when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places" (#17, p. 300). This issue is highly relevant when controversial class content issues are part of a sexual harassment claim. Both sides of the claim should ask: "Is the class material under question different from the reasonable person's everyday exposure?"

A third issue is "the reasonable woman test." Courts who take this perspective reject the "gender-neutral" view as "male-biased" on the notion that men and women may have different perceptions about conduct in the workplace and that what men might consider to be harmless and innocent, "women of reasonable sensibilities" might find offensive and hostile. This issue is important to be aware of when complaints of harassment are being evaluated so that both sides are able to articulate why a particular "perspective," reasonable woman or reasonable person, is relevant to the circumstances of a particular classroom environment (#17, p. 300-302).

III. "ACADEMIC FREEDOM" ISSUES

There are also three issues of "academic freedom" that require special attention when discussing the topic of sexual harassment and academic freedom. Of particular concern is the determination of whether "speech" can be considered "conduct," and if "conduct," is then protected by First Amendment rights? In several decisions, the Supreme Court seems to imply that Title VII might constitutionally limit certain forms of expression based on two theories: "first, harassment constitutes 'conduct,' not speech; or secondly, if speech, harassment constitutes 'fighting words,' a recognized exception to the First Amendment" (#17, p. 302). In terms of the principles of academic freedom, "free speech" in the classroom where ideas -- even controversial, offensive ones -- are supposed to be freely exchanged, would be drastically restricted if the concept of equating "speech" with "conduct" in the creation of a "hostile environment" is enforced.

A second academic freedom issue concerns the "censorship" implications of some of the court rulings in "hostile environment" sexual harassment cases. The EEOC's definitions of "verbal and physical conduct of a sexual nature" and "hostile or offensive environment" are dangerously vague and over-broad. Many universities have incorporated this same language into their sexual harassment policies without considering the risks. As Carol Simpson Stern, professor and chairperson of the department of performance studies at Northwestern University and a past president of the AAUP, warns: "It is all too obvious, for example, that such language has the potential to chill artistic expression. Many incidents already have been reported on campuses in which students or institutions have censored artistic expression, removing artworks or banning alleged pornography, in the name of protecting students from a 'hostile' environment" (#18, p. B1).

A third academic freedom issue follows from the above example, and that is the issue of "protectionism." Many feminist and pro-feminist scholars object to aspects of "hostile environments" rulings because they believe they spring from paternalism. For example, one court in California linked the need to limit offensive speech to "the need to protect women and children" (#17, p. 311). Linking women and children together in the same sentence clearly demonstrates these scholars' complaints. In the recent court decision overturning the University of New Hampshire's sexual harassment case against J. Donald Silva, Judge Devine took a similar anti-protectionist stance when he argued the students in the class were adults and were "presumed to have the sophistication of adults" (#12, p. A22). Jane Gallop, professor of English and Comparative Literature at the University of Wisconsin, Milwaukee, also strongly argues against the protectionist dimensions of sexual harassment policies which include prohibitions against consensual relations:

> I do not think the solution is to deny people with less power the right to consent. This is, I believe, the standard, protectionist path, which protects women by restricting us. As a feminist, I recognize that women are at a disadvantage but believe that denying women the right to consent further infantilizes us, denies us our full humanity. Prohibition of consensual relations is based in the assumption that when a woman says 'yes' she really means 'no.' I cannot help but think that this proceeds from the same logic in which when a woman says 'no' she really means 'yes.' The first assumption is protectionist; the second reflects the logic of harassment. Common to both is the assumption that women do not know what we want, that someone else, in a position of greater knowledge and power, knows better (#5, p. 22).

IV. SOME OTHER IMPORTANT QUESTIONS TO ASK

In reviewing a diverse spectrum of materials for the purpose of this paper, I came across a variety of other issues that do not neatly fit into either "hostile environment" or "academic freedom" but which are relevant to both categories. One is the question of whether sexual harassment policies emphasize sexual morality rather than sex discrimination. Two informative quotes from two highly respected feminist scholars illustrate the parameters of this question. Carol Simpson Stern argues:

> The academic freedom to teach is chilled when professors are afraid to discuss topics related to sexuality lest they be accused of sexist attitudes or verbally seductive behavior....Probably the best way to

> end this society's sexism is not to stifle its expression but to stimulate discussion about it, answering bad speech with more speech....Some students have interpreted discussion of homosexuality as a kind of 'cruising' behavior, in each case concluding that it constituted harassment. If teachers have to worry about whether a vulnerable student might misinterpret a discussion of sexuality, their speech will be stifled and they will be likely to lose perspective, treating students not as equals but as children (#18, p. B1-2).

In a similar vein, Jane Gallop contends: "Just as not all sexism is equal, not all sexuality is sexist. When we understand harassment as bad because sexual, not only do we narrow our focus and leave undisturbed all the creeps who have been systematically discouraging women students in nonsexual ways, but we also risk too broad a focus which would target the sexual 'per se' and censure appearance of the sexual which benefit the cause of women and education" (#5, p. 21).

A second question that is of serious concern is the adverse impact that sexual harassment codes may be having upon homosexuals. Gay-rights activists and other faculty members believe that homosexual professors are much more likely to be dismissed or asked to resign far more often than their heterosexual peers. Also, because homophobia is as deeply rooted in our society as sexism, many members of gay and lesbian academic caucuses are highly skeptical that gay faculty members accused of harassment can get a fair hearing from either their peers or in court. In one ironic case involving a gay professor at my own institution, he lost his case because his lawyer instructed him not to defend himself at hearings for fear the case would be taken to civil court and he would be in violation of state laws prohibiting homosexual sexual behavior, whether or not it was consensual.

A third area of questions concern the vague notion of "motive" and/or "intention" of the accused harasser. What about the professors in fine-arts disciplines such as dance, voice, and theatre, or in physical education or physical therapy courses, in which the body is the instrument? Most of us are aware of how easily certain kinds of behavior can be misconstrued as harassment. "Some cases that have resulted in the dismissal of faculty members have been built upon such 'wrongful' behaviors as hugging a student in a recital hall after a performance when other teachers and students are also offering congratulatory hugs; touching a student in the midriff area during a vocal lesson; being too familiar when directing an acting scene" (#18, p. B2). A related question important to feminists and professors of women's studies is: when does sharing "personal" information about sexuality cross over the hazy boundaries of sexual harassment policies and become offensive? Feminists have struggled for more than two decades to elevate the "personal" to stand along side "objective" knowledge. Yet, with the advent of vague definitions of an "offensive, hostile environment" and the courts seldom giving weight to the "intentions" of the accused harasser, many faculty may return to the traditional male learning pattern of dismissing the "personal and subjective" out of fear of being accused of sexual harassment (#16, p. 7 and #5, p. 18).

V. CONCLUDING THOUGHTS

As the author of this paper I wear many different hats. As a woman I, along with all the women I know, have been a victim of sexual harassment. As a feminist and professor of women's studies, I want the world to be one where both females and males have equal opportunities and equal chances for academic and career success in nonoffensive, nonhostile environments. As a professor of communication studies and a member of the board of the Rhode Island chapter of the ACLU, I champion the Bill of Rights and am a zealous protector of free-speech rights. As a longtime active and participative member of the AAUP both locally and nationally, academic freedom, with its recognition of ethical and professional responsibility, has always been of paramount concern. And as a founding-member of my institution's faculty collective bargaining union, I want my colleagues to be well-informed of their rights and responsibilities and, if accused of wrong behavior, to be guaranteed due process and fair treatment. To wear all of these hats is to often feel like a schizophrenic when dealing with issues of sexual harassment. For the sake of myself and all of those directly involved with or directly affected by sexual harassment policies, we need clear definitions of sexual harassment, clear and fair complaint procedures, guaranteed due process and, above all, constant debate and dialogue.

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[Note: I would like to express my appreciation to my two research assistants, Karen Church and Jason McGuire, who helped me track down research through the library CD ROM system and who covered some of my classes when I had knee surgery.]

ACADEMIC FREEDOM AND SEXUAL HARASSMENT

C. SEXUAL HARASSMENT AND ACADEMIC FREEDOM

Ralph S. Brown, Professor
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For several years, the American Association of University Professors has been striving, or perhaps I should say struggling to develop a policy statement on sexual harassment in higher education. The principal participants in this exercise have been two of the AAUP's committees that sometimes do not have identical priorities -- Committee A on Academic Freedom and Tenure, and Committee W on the Status of Women in the Academic Profession. Each in recent years produced statements which encountered doubts as to their adequacy. The latest attempt is the product of a joint sub-committee of both Committees A and W. It has already been approved by Committee W, and should come before Committee A for consideration at its next meeting in June 1995. It is my hope that the joint production will be adopted, so that it can then go before the Association's Council to be promulgated as Association policy.

Why should this drafting exercise have been attended by difficulties and delays? Surely all right-thinking people in any organization are opposed to sexual harassment, and the AAUP almost axiomatically is composed of right-thinking people.

The difficulty, such as it is, arises from AAUP's special interest in academic freedom, and its concern that far-fetched claims of sexual harassment, if heeded and acted upon, may be at odds with academic freedom.

Examples of far-fetched claims are not hard to find. They tend to be a little gamy, but bear with me, and please do not feel harassed.

I suppose my favorite horror story is the case of a professor at the Chicago Theological Seminary who was expounding differing interpretations of the Talmud. He adduced (as he had done for thirty years) a Talmudic fantasy -- I find it hard to take this seriously but it is said to exist -- about a carpenter who fell off of a roof and landed on a woman in such a posture that he quite accidentally had intercourse with her. I do not mean to be disrespectful of Talmudic exegesis, but there it is, addressed to a conclusion that the carpenter was innocent, because the act was unintentional.

Anyway, someone was offended and complained; there were disciplinary proceedings against the professor; and he wound up stigmatized as a sexual harasser and subjected to having an administrative watchdog tape-record his classes. This, I suggest, was an outrageous and demeaning episode.

We have now to refer to the documents that have been provided you, notably the "guidelines" of the Equal Employment Opportunity Commission. The quoted guideline is the source of the proposition that the creation of a "hostile working environment" is a form of forbidden harassment.

Note that the EEOC is concerned only with the workplace. We think that the classroom, and the student-faculty environment generally, are not a "workplace." We hope -- sometimes in vain -- that people in that setting do work, but the main business of the academic setting is learning, not labor.

Never mind, the EEOC formula has been widely accepted, not least by the Supreme Court; and it was included in the 1990 AAUP policy that is also before you.

When the Committee A subcommittee attacked the problem we -- I now say we because I had the arduous distinction of chairing that subcommittee -- we strove mightily to avoid the "hostile environment" notion. You will see that the words do not appear in the 1994 statement (p. 2 of the handout).

Let me try to explain our reasons for avoiding "hostile environment." They were set forth at some length in our report in Academe. In essence, our concern was that creation of a "hostile environment" was just too vague a notion to form a basis for sanctions against a faculty member. Accordingly, the subcommittee took pains to forbid only offensive speech that had an identifiable target. What about seemingly generalized slurs? For example, a professor (I hope his species is extinct) who says, "Women have no business in engineering." This was attempted to be covered in the concluding paragraph of the 1994 proposal, which says that "In some cases a speaker's intention...may make clear that there was a target, though not explicitly identified..."

What about sexist slurs that cannot be associated with identifiable targets (for example, when there are lots of women in an engineering school)? To deal with diffuse offensiveness the subcommittee report fell back on other Association policy statements, for example its Statement on Professional Ethics, which admonishes professors to "avoid any exploitation, harassment, or discriminatory treatment of students." I will return to the relevance of these general exhortations to do the right thing.

Now, when this draft encountered considerable criticism, a new joint subcommittee drawn from Committees A and W was formed. Its proposal is the document, on pp. 2 and 3 of the handout. The introduction to this proposal and first two numbered paragraphs are the same as the 1994 Committee A submission. Paragraph 3, on p. 3, revives the "hostile environment" language, extends it to "coworkers," and adds important qualifications: for speech to be censurable, it must be offensive and create a hostile environment (note that the "and" is underlined.) If it arises in a teaching context, it must be "persistent, pervasive, and not germane to the subject-matter.

Do these qualifications give a professor (or a student speaking up in class) adequate warning of appropriate limits? As of today, I am inclined to think that they do. But I am at odds with distinguished colleagues on the Committee A subcommittee. I hope there will be time for discussion today, and that you will help me.

Why am I tentatively willing to accept "hostile environment," as now qualified? Essentially, because I do not think it is any more vague than other AAUP standards that we live with.

I will give one example of a deeply entrenched AAUP standard (I note in passing that when one scans the AAUP Policy Documents, they are predominantly concerned with good procedures). But here is a statement of substance, from the "1970 Interpretative Comments" endorsed by the AAUP Annual Meeting in that year as a correct reading of the fundamental 1940 Statement of Principles on Academic Freedom and Tenure, which is our Alpha and Omega.

The 1970 Interpretations, now with us for a quarter-century, declare the 1966 Statement on Professional Ethics, which I have already quoted, to be "of particular relevance."

Then the 1970 Interpretations, with respect to the basic admonition of the 1940 Statement against faculty intruding "into their teaching controversial material which has no relation to their subject," say that "Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject."

I suppose we can all agree that sexually harassing conduct and speech are rarely if ever relevant to any subject, and are surely not if they are "persistently intruded" (unless the subject is the nature of sexual harassment)?

My central point is that AAUP standards are -- I would say unavoidably -- so general in their expression that it is not necessary for their validation to require that improper speech be defined only as speech that has an identifiable target -- the stance of the Committee A group.

An impermissible "hostile environment" can exist, and it can be identified, I am now inclined to believe. What is needed is a good dose of common sense in responding to complaints. What is "common sense" in this touchy area? Examples to be sure are treacherous. But let me give another one, to compare with the story of the impetuous carpenter in the Talmud.

My other example is the much-publicized case of the part-time teacher of expository writing at the University of New Hampshire who unduly enlivened his class with clearly sexual imagery about zeroing in on one's topic, and who also was unduly familiar with some of his students, for example asking them to submit charts of how they spent their time. There were a number of complaints from students to administrators, and the instructor (who was also a pastor with a congregation) was suspended, subjected to a poorly conducted hearing, and ordered to seek (and pay for) counselling!

He went to court, found a sympathetic federal judge, and won reinstatement. The Trustees of the University huffed and puffed about an appeal, but then caved in.

What are the lessons of the New Hampshire case, and of the Chicago Seminary one?

Simply, do not be so uptight. I assume that a student complaint lay behind the Chicago case. The complaint, or complaints, in my opinion should have been brought together with the professor, by an administrator aiming to mediate rather than prosecute. Perhaps his explanation that he had used the same story for thirty years might have been pacifying

In the New Hampshire case, where the complaints were several and were strongly expressed, in my judgment the teacher was rather off-base. But the University's reaction was excessive. Was mediation or counselling attempted there?

I have jumped a long way from AAUP formulas, to the practical aspects of dealing with harassment claims. I have come to doubt that formulas can be effective, though I do not at all doubt that it is necessary to keep reiterating formulas on the need for tolerance and freedom in teaching.

MATERIAL TO ACCOMPANY REMARKS ON SEXUAL HARASSMENT AND ACADEMIC FREEDOM

The American Association of University Professors has been trying to settle on a policy statement on this topic for some years. Overhanging any such statement is a widely accepted "guideline" of the Equal Employment Opportunity Commission, promulgated in 1980:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (29 C.F.R. 1604.11[a]).

The EEOC guidelines have been widely emulated by institutions of higher education for application to the classroom and campus, commonly by substituting "learning" for "working" in clause (3). They were endorsed by the Supreme Court in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), a case arising from a workplace, not an academic, setting.

AAUP policy was established in 1990 by the Annual Meeting's adoption of the following recommendation for policy of institutions of higher education. It originated in AAUP's Committee on the Status of Women in the Academic Profession.

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
>
> 1. Any such proposals are made under circumstances implying that one's response might affect such academic or personnel decisions as are subject to the influence of the person making such proposals; or
>
> 2. Such conduct is repeated or is so offensive that it substantially contributes to an unprofessional academic or work environment or interferes with required tasks, career opportunities, or learning;

> 3. Such conduct is abusive of others and creates or implies a discriminatory hostility toward their personal or professional interests because of their sex.

AAUP's Committee A on Academic Freedom and Tenure, uncomfortable with this statement, created a subcommittee to produce an alternative, and in 1994 approved (for publication only) the following:

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:
>
> 1. Such proposals are made under circumstances implying that one's response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or
>
> 2. Such speech or conduct is directed against another, and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct.
>
> In some cases the speaker's or actor's intention, taken with the effects of the speech or action, make clear that there was a target of harassment, though the person or persons were not explicitly identified. In such cases, the foregoing policy applies.

It will be noted that this proposal avoids the EEOC language condemning creation of an "intimidating, hostile, or offensive working environment."

Especially because of this avoidance, the Committee A proposal, when published in Academe (Sept.-Oct. 1994, p. 64), attracted critical comment (ibid. 68-72).

The next step was the creation of a joint subcommittee drawn from Committees A and W. That subcommittee has produced the following, (approved by Committee W, and under consideration by Committee A):

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitute sexual harassment when:

1. Such proposals are made under circumstances implying that one's response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or

2. Such speech or conduct is directed against another, and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or

3. Such speech or conduct is reasonably regarded as offensive and creates a hostile environment that substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter, because the classroom is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.

It will be noted that the latest proposal revives the "hostile environment" concept in its paragraph 3., with important qualifications.

VI. FACULTY COLLECTIVE BARGAINING AT HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

FACULTY COLLECTIVE BARGAINING AT HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

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I. STATISTICAL ANALYSIS

It is well established that the density of collective bargaining among higher education faculty is among the highest of any sector of the U.S. economy (33 percent), as it is approximately double that of the work force in general. However, as has been pointed out, the proportion of faculty covered by collective bargaining varies significantly by geography and sector, with the overwhelming majority (96 percent) being at public institutions and in those states that permit public employee organizing. There is variation among these states, though. For example, 100 percent of public four year institutions in states with overall high union density such as New York, New Jersey, Massachusetts, Rhode Island, Connecticut and Delaware are unionized, while that is not the case in states such as Nebraska, Kansas, and Iowa, which, while permitting faculty to unionize, have lower overall rates of unionization.[3]

The above alerts us to the need to examine rates of unionization in terms of institutions as well as individual faculty members, since it is the institution that is the workplace. Measured this way, 489 of the approximately 3000 colleges and universities in the US are organized, or 16 percent. Obviously, this figure increases if we restrict the denominator to those institutions that are eligible to collectively bargain.[4] It is in this light that we examine the phenomenon of faculty collective bargaining at historically black colleges and universities.

To date, as far as we can ascertain, there has been no scholarly writing on this topic. Conversations with both faculty and administrators on the topic indicate a general lack of awareness as to the nature or extent of collective bargaining at historically black institutions. The authors have heard, more than once, comments such as "Faculty don't organize at HBCU's because they do not consider faculty unions to be appropriate for professionals." It is ironic that such remarks echo those made at majority institutions, especially during collective bargaining campaigns. Also, there is no doubt that the general public is unaware of the extent of collective bargaining among college and university faculty in this country. More sophisticated observers of higher education in general and HBCU's in particular, correctly note that most HBCU's do not have faculty collective bargaining, either because they are public institutions in southern states that do not permit faculty bargaining, or because, in the case of private institutions, they are church related or of religious origin institutions and are in the south, where unionization is not common in any sector. It is worth noting that the majority status church related institutions in the south also generally do not bargain collectively. Finally, with respect to all private institutions, the Yeshiva decision is, of course, a major barrier to organizing.

A more detailed examination of the historically Black institutions of higher education reveals some interesting and perhaps surprising results. To begin with, we have to deal with the problem of defining just what is an HBCU. While it is generally understood that the HBCU's are those colleges and universities that were originally established for the express purpose of educating African-Americans, either by states determined to maintain a racially segregated system public higher education, or by religious denominations (e.g. African Methodist Episcopal Church) seeking to provide its African American members an opportunity for higher education, there is no "official" list of such institutions.

There is however, the National Association for Equal Opportunity (NAFEO) which "represents the historically and predominantly black colleges and universities of this nation."[5] There are 117 NAFEO member institutions and while the overwhelming majority are traditional HBCU's some are members because they serve predominantly African-American populations, even though they may be located in northern states and are part of majority systems (e.g. York College of the City University of New York).

Tables 1 and 2 list the 117 NAFEO member institutions by state, the first being a list of private sector and the second a list of public sector institutions. Also indicated is whether the institution is a two-year, four-year, or medical school, and if organized, the affiliation of the faculty agent. Public sector institutions in states where there is no enabling legislation are indicated with an "I", meaning they are ineligible to bargain. Table 3 summarizes Tables 1 and 2 as to the number and proportion of institutions with faculty collective bargaining.

Overall the pattern is the same as that found for faculty collective bargaining in higher education generally. Roughly the same proportion of institutions (15-16 percent) are organized. The overwhelming majority (89 percent) of the eighteen organized HBCU's are in the public sector. It is worth noting that eleven of the eighteen are part of majority public sector units, six in the two-year sector and five in the four-year sector, raising the unanswerable question of whether faculty at these institutions would have voted for collective bargaining for their institutions alone.

TABLE 3
COLLECTIVE BARGAINING STATUS OF NAFEO INSTITUTIONS

	Number of Institutions	Number with Faculty CB	Percent with Faculty CB
Total	117	18	15.3
Public	56	16	28.6
Two Year	14	7	50.0
"Eligible"	7	7	100.0
Four Year	42	9	21.4
"Eligible"	10	9	90.0
Private	61	2	3.3

Even in the private sector, where all acknowledge organizing is very difficult in the face of the Yeshiva decision, we find two organized HBCU's (not counting Florida Memorial College, which organized in 1976 and voluntarily decertified in 1989, one of the few units, HBCU or majority, to do so), one of which, Edward Waters College, organized in 1992 following that decision.

Again, as is the case with faculty collective bargaining in general, agents at HBCU's are affiliated with AAUP, AFT, or NEA, or in the case of the City University of New York Institutions, are jointly affiliated with AAUP and AFT. There is only one free standing two-year NAFEO member institution with collective bargaining, and that is affiliated with AAUP, as are five of the six free standing four-year HBCU's with collective bargaining. This predominance of the AAUP may come as a surprise to some, but when examined in the light of the particular history of each institution, it is understandable. Two examples follow.

Delaware State University was organized by AAUP in 1976, four years after the majority public institution in the state, the University of Delaware. The two are only forty miles apart, and during this time, there were a number of programs and activities which brought faculty from the two institutions together on a regular basis. Frequent communication between the AAUP chapters, and the faculty at both institutions, as well as similar administrative conditions, were instrumental in the subsequent election at Delaware State.

Central State University (OH) organized in 1986, shortly after the passage of enabling legislation. The institutions had a large and active AAUP chapter for many years, and two of the three universities in the state that had organized under consent agreements (University of Cincinnati and Kent State University) were affiliated with AAUP. In addition, the AAUP state organization in Ohio is well developed and has been for quite some time.

II. ANALYSIS OF CONTRACTS

Having established, then, that faculty collective bargaining at historically Black colleges and universities does exist, and in roughly the same proportions and at the same type of institutions as is the case for higher education as a whole, we turn our attention to the content of the collective bargaining agreements at some of them. Here, our brief analysis is restricted to four of the five free standing four year HBCU's with collective bargaining agreements (the sixth, Edward Waters College is just concluding negotiations on its first agreement). Those are Central State University (OH), Delaware State University (DE), Lincoln University (PA), and Wilberforce University (OH), all of which are AAUP affiliates (the sixth free standing HBCU with faculty collective bargaining, the University of the District of Columbia, is an NEA affiliate). The question is to what extent, if any, these agreements vary from those in majority institutions.

Figures 1-4 reproduce the Tables of Contents of the four agreements. Figures 5-8 reproduce the Tables of Contents for four majority institutions that are geographically proximate in the case of the three public sector HBCU's and one which is similar in size and structure in the case of the private sector HBCU. Examination reveals the two groups are similar in content as well as each individual contract having a lot in common with all of the others. All contain clauses dealing with recognition, non-discrimination, faculty status, governance, workload, salary and compen-sation, dues deduction, union rights, management rights, grievance, separability, and duration. The duration clause of the Delaware State Contract differs from the majority of such clauses in faculty collective bargaining contracts in that it specifies that the "...Agreement shall continue in effect during the period of negotiations until new agreement is reached." Most include clauses dealing with the specifics of faculty status, reappointment, promotion, and tenure, while two -- Lincoln University and the University of Delaware -- reference governance documents which deal with these issues. The fact that all the agreements are more similar than different stems from the similar legal environment due to the commonality of labor laws, and more importantly, the similarities among institutions of higher education. The differences among agreements, specifically the different ways in which similar functions are exercised, are, of course, idiosyncratic to the specific nature of each institution.

With respect to the Delaware State University agreement, faculty concerns have dealt primarily with faculty status matters and differing interpretations of contract language. During her time on the contract created grievance panel (which constituted "step 2," the next two steps being the President and binding arbitration), the majority of cases heard by the second author dealt with search procedures for new appointments, qualifications for appointment, academic judgment questions regarding promotion and tenure, and annual evaluations. The strengths of this particular contract, especially when measured against non-bargaining HBCU's, based on the concerns of faculty at the latter as they have been articulated to both authors, appear to be workload, professional development, department travel, and common hours. Workload is clearly specified and known well in advance of the start of the semester. The contract provides both a mechanism of professional development and funds it. There is an agreed upon travel budget for each department. Of course, the presence of a grievance procedure, ending in binding arbitration is a feature common to most faculty collective bargaining contracts.

III. SUMMARY AND CONCLUSION

The proportion of historically Black institutions with faculty collective bargaining approximates that of all colleges and universities in the United States. Also similar is the distribution among public and private institutions. An examination of the content of the collective bargaining agreements of four HBCU's show that they are similar to each other, as well as to faculty collective bargaining agreements in general. Further research focusing on the similarities and differences in the proportion of institutions with collective bargaining and the content of collective bargaining agreements with respect to other variables, such as Carnegie classification, would be a fruitful next step in the study of higher education collective bargaining.[6]

TABLE 1
COLLECTIVE BARGAINING STATUS OF NAFEO INSTITUTIONS-PRIVATE SECTOR

State	Institution	2 or 4 year	Collective Bargaining Status (Organized, Unorganized, Ineligible) (If organized, agent-AAUP, AFT, NEA)
AL	Miles College	4	U
AL	Selma University	4	U
AL	Concordia College	4	U
AL	Oakwood College	4	U
AL	Tuskegee University	4	U
AL	Stillman College	4	U
AL	Talladega College	4	U
AR	Shorter College	4	U
AR	Arkansas Baptist College	4	U
AR	Philander Smith College	4	U
CA	Charles Drew Univ of Med & Science	Med	U
DC	Howard University	4	U
FL	Bethune Cookman College	4	U
FL	Edward Waters College	4	O-AAUP
FL	Florida Memorial College	4	U*
GA	Clark Atlanta University	4	U
GA	Morehouse College	4	U
GA	Paine College	4	U
GA	Spelman College	4	U
GA	Morehouse School of Medicine	Med	U
GA	Morris Brown College	4	U
IN	Martin University	4	U
KY	Simmons University Bible College	4	U
LA	Xavier University	4	U
LA	Dillard University	4	U
LA	Langston University	4	U
MD	Sojourner-Douglass College	4	U
MI	Lewis College of Business	4	U
MO	Lincoln University (of Missouri)	4	U
MS	Natchez Junior College	4	U
MS	Rust College	4	U
MS	Tougaloo College	4	U
MS	Mary Holmes College	4	U
NC	Saint Augustine's College	4	U
NC	Bennett College	4	U
NC	Barber-Scotia College	4	U
NC	Shaw University	4	U
NC	Johnson C. Smith University	4	U
NC	Livingstone College	4	U
OH	Wilberforce University	4	O-AAUP

*Florida Memorial College was organized by UFF-NEA in 1976 and decertified in 1989

TABLE 1
COLLECTIVE BARGAINING STATUS OF NAFEO INSTITUTIONS-PRIVATE SECTOR (Cont.)

State	Institution	2 or 4 year	Collective Bargaining Status (Organized, Unorganized, Ineligible) (If organized, agent-AAUP, AFT, NEA)
SC	Claflin College	4	U
SC	Clinton Junior College	2	U
SC	Benedict College	4	U
SC	Morris College	4	U
SC	Voorhees College	4	U
SC	Allen University	4	U
TN	Lemoyne-Owen College	4	U
TN	Fisk University	4	I
TN	Lane College	4	U
TN	Knoxville College	4	U
TN	Meharry Medical College	Med	U
TX	Huston-Tilotson College	4	U
TX	Jarvis Christian College	4	U
TX	Southwestern Christian College	4	U
TX	Texas College	4	U
TX	Paul Quinn College	4	U
TX	Wiley College	4	U
VA	Virginia Seminary and College	4	U
VA	Saint Paul's College	4	U
VA	Hampton University	4	U
VA	Virginia Union University	4	U

TABLE 2
COLLECTIVE BARGAINING STATUS OF NAFEO INSTITUTIONS-PUBLIC SECTOR

State	Institution	2 or 4 year	Collective Bargaining Status (Organized, Unorganized, Ineligible) (If organized, agent-AAUP, AFT, NEA)
AL	Tremholm State Technical College	2	I
AL	Lawson State Community College	2	I
AL	Alabama A & M	4	I
AL	Alabama State University	4	I
AL	J.F. Drake State Technical College	2	I
AL	Bishop State Community College	2	I
AR	University of Arkansas-Pine Bluff	4	I
DC	University of the District of Columbia	4	O-NEA
DE	Delaware State University	4	O-AAUP
FL	Florida A & M University	4	O-UFF/NEA
GA	Savannah State College	4	I
GA	Albany State College	4	I
GA	Fort Valley State College	4	I
GA	Atlanta Metropolitan College	2	I
IL	Kennedy-King College	2	O-AFT
IL	Chicago State University	4	O-UPI/AFT
KY	Kentucky State University	4	I
LA	Southern University-New Orleans	4	I
LA	Southern University-Shreveport	4	I
LA	Southern University - Baton Rouge	4	I
LA	Grambling State University	4	I
MA	Roxbury Community College	2	O-NEA
MD	Bowie State University	4	I
MD	Morgan State University	4	U
MD	Coppin State College	4	I
MD	University of Maryland-Eastern Shore	4	I
MI	Wayne County Community College	2	O-AFT
MI	Highland Park Community College	2	O-AFT
MO	Harris-Stowe State College	4	I
MS	Alcorn State University	4	I
MS	Jackson State University	4	I
MS	Mississippi Valley State University	4	I
MS	Hinds Community College Utica Campus	2	I
MS	Coahoma Community College	2	I
NC	Elizabeth City State University	4	I
NC	Winston Salem State University	4	I
NC	North Carolina A & T University	4	U
NC	North Carolina Central University	4	I
NC	Fayetteville State University	4	I
NY	New York City Technical College-CUNY	2	O-PSC/AAUP/AFT
NY	LaGuardia Community College-CUNY	2	O-PSC/AAUP/AFT
NY	York College-CUNY	4	O-PSC/AAUP/AFT
NY	Medgar Evers College-CUNY	4	O-PSC/AAUP/AFT
OH	Central State University	4	O-AAUP
OH	Cuyahoga Community College	2	O-AAUP

TABLE 2
COLLECTIVE BARGAINING STATUS OF NAFEO INSTITUTIONS-PUBLIC SECTOR (Cont.)

State	**Institution**	**2 or 4 year**	**Collective Bargaining Status (Organized, Unorganized, Ineligible) (If organized, agent-AAUP, AFT, NEA)**
PA	Cheyney State University	4	O-APSCUF/AFT
PA	Lincoln University	4	O-AAUP
SC	South Carolina State University	4	I
TN	Tennessee State University	4	I
TX	Texas Southern University	4	I
TX	Prairie View A & M University	4	I
VA	Norfolk State University	4	I
VA	Virginia State University	4	I
VI	University of the Virgin Islands	4	U
WV	Bluefield State College	4	I
WV	West Virginia State College	4	I

FIGURE 1
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1. Director, Chapter and State Services, American Association of University Professors, Washington D.C.

2. Associate Professor, College of Nursing, Howard University, Washington D.C., and formerly Associate Professor at Delaware State University, where she served in a variety of positions related to collective bargaining, including chapter officer, negotiating team member, and grievance hearing panel member.

3. All of the data referenced in this paragraph are from the Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education (The National Center for the Study of Collective Bargaining in Higher Education and the Professions-Baruch College, The City University of New York, Volume 20, January 1994).

4. The Yeshiva decision notwithstanding, in the instant analysis, faculty at private sector institutions are considered eligible for collective bargaining given that there have been certifications in that sector since that decision (e.g. Edward Waters College and Delaware Valley College).

5. Membership list of NAFEO, February 1995.

6. The senior author is currently researching the proportion of institutions with faculty collective bargaining by Carnegie classification as well as salary comparisons between organized and unorganized institutions.

VII. THE CHANGING NATURE OF PROFESSIONALISM

A. The Case of the Police

THE CHANGING NATURE OF PROFESSIONALISM

A. THE CASE OF THE POLICE

Barbara Raffel Price, Dean of Graduate Studies
John Jay College of Criminal Justice

THE LONG SEARCH FOR PROFESSIONALISM

The police have been talking about professionalism for almost a century. Since the early 1900s under the leadership of August Vollmer, the father of American policing and the founder in 1908 of the first training school for police, law enforcement has been fascinated by the possibilities of professionalism. For the police in those early years, professionalism meant control of their work world with an end to interference from corrupt politicians who appointed unqualified patrolmen and interfered in the hiring and firing of officers as well as controlled everyday assignments. But for Vollmer, professionalism also held a loftier meaning -- something he called 'scientific policing'. This notion was at the time very close to a professional model; scientific policing emphasized a style of policing that was detached, objective and, especially, adopted techniques that took advantage of the latest scientific advances in detecting and solving crimes and in the approach to patrolling the streets of a community.

Soon after Vollmer appeared on the scene, the police incorporated the term, professionalism, into their public rhetoric. However, policing remained an occupation which had far to go before it would be considered a profession. The principal barrier to professionalism, then as now, is the fact that policing is in one fundamental way unlike any other field striving to professionalize; it has as its core both the duty and the right to use coercion -- an act which fosters a work culture which is the antithesis of professionalism, understood, as it usually is, as service to the client.

Professionalism normally includes: 1) a transmittable body of knowledge which is constantly growing and being refined; 2) a code of ethics defining relations between members of the profession and the public including an obligation to render services exclusive of any other considerations; 3) high standards for membership in the occupation; often including higher education and formal training; 4) accountability through peer review and, therefore, continuous evaluation and improvement through research of professional practices; and 5) at some point in the evolution of the occupation, acknowledgement from outsiders that the occupation is a profession.

Although these demanding criteria arguably present significant obstacles to efficient policing, many in policing, in government policy-making positions, and some politicians and academics who study policing have continued to believe in and work toward the professionalizing of law enforcement. Central to that effort over the years has been an insistence that education levels of police be raised. Following Vollmer's efforts in the 1920s, the first national commission, known as The Wickersham Commission, examined the police role in 1931. Its report made clear that there was a need for college educated police; then, in 1933 Vollmer was able to establish at the University of Chicago a college major in criminology. In 1962, a commision established by President Johnson pointed out "the complexity of the police task is as great as that of any other profession." In 1973, The National Advisory Commission on Criminal Justice Standards and Goals urged that every police department in the United States require by 1982 four years of college education. (In 1995 only a handful of departments require recruits to have a college degree. The New York City Police Department requires it only for the ranks of Captain and above.) I should also point out that most police unions have vehemently opposed education for recruits, as they have other components of professionalization including peer review and accountability.

WHY IS PROFESSIONALISM A GOAL OF LAW ENFORCEMENT?

The most basic answer is that public confidence in the police is essential for order maintenance and stability in the community. When the police are distrusted, government itself is undermined and communities are in jeopardy of anarchy. Professionalism instills confidence and respect in an occupation, because to the public it means that the practitioners have internalized values of service, even altruism, self-control, and commitment to high ideals of behavior. Further, professionalism implies higher education; many who seek to improve the police through education argue that this training will help police gain an understanding of the role of the police in a democratic society and a fuller comprehension of the responsibilities that come with police power. A 1967 national commission on policing appointed by President Johnson in the wake of widespread dissatisfaction with the police handling of civil disturbances put it this way:

> Complexities inherent in the policing function dictate that officers possess a high degree of intelligence, education, tact, and judgment, physical courage, emotional stability, impartiality, and honesty.... Far too many of those charged with protecting life...and rationally enforcing our laws are not respected by their fellow officers and are incompetent, corrupt or abusive. One incompetent officer can trigger a riot, permanently damage the reputa-tion of a citizen, or alienate a community against a police department. It is essential, therefore, that

the requirements to serve in law enforcement reflect the awesome responsibility facing the personnel that is selected.

> Task Force: The Police, The President's Commission on Law Enforcement and the Administration of Justice, 1967-68.

WHAT HAS HAPPENED IN RECENT YEARS?
WHAT IS THE OUTLOOK FOR THE FUTURE?

Since the 1960s when the Federal government began to assume a major role in upgrading and improving the quality of law enforcement, significant progress has been made. As full of problems as policing is today, it has improved significantly since the late 1960s (Murphy, "New York City Policing in the 1990s," unpub. 1989). Police are better educated today. Departments are more representative of the communities and populations they serve; police are more restrained in the use of deadly force. The number of people killed by the police has declined approximately 50 percent from 1971 to 1984 and the number of officers killed has also declined 50 percent. Research on policing has expanded from virtually none in the 1950s to a considerable volume generated by universities, research institutes such as Rand, non-profit foundations, and Federal agencies, especially the Justice Department. But much more is needed.

When policing began in this country in the late 1880s, the main skill required for policing was the ability to use brute force. Through the years, patrol, operated by officers walking the beat and controlling situations by the authority of their presence, the symbolism of the uniform and officers' skill in using language to gain compliance, developed. Later, the patrol car and, thereafter, the radio were introduced; speed in response to calls and efficiency in policing as measured by clearance rates soon became hallmarks of professionalism. Following widespread civil rights rioting in cities around the nation in the 1960s, law enforcement developed a strategy of attending to police-community relations which stressed police sensitivity to diverse needs and cultures within the community.

For the past few years, the emphasis within policing has been directed at a new, comprehensive strategy called variously, community policing or problem-oriented policing. In order to work, community policing requires professional police who have acquired non-traditional police skills so that they can bring the community into the enforcement process as a co-participant in the control of crime and maintenance of order. Community policing also requires that communities develop consensus as to what steps should be taken to prevent or reduce crime and it requires cooperation and follow-through by the police and the community. This collaborative form of policing is considered a softer style of policing than the more proactive, aggressive policing typified by swat teams.

The question arises as to whether a level of trust sufficient to work with the police exists in those communities which are most crime-ridden; community policing also raises questions as to whether police have the requisite community organization skills, the problem-solving skills, and the ability to mobilize whatever scarce community resources exist to solve problems.

If there is a future to the professionalization of policing, many in the law enforcement community believe it rests in pursuing community policing. But others would argue that it is an impossible dream. From the community's standpoint, there is too little cohesion or ability to respond to police initiatives. From the police standpoint, the requisite skills are difficult to obtain and require mid-management support and facilitation which has, to date, been notably lacking. And then there is the question of availabilty of resources in the community and their efficacy for solving problems.

About the same time that community policing was being introduced around the country, the infamous beating of Rodney King by the police was recorded on home video and law enforcement experienced a number of other incidents of police violence. As a result, public support and trust of the police has eroded substantially, not only in this country but also in Europe which faced similiar poblems (Reiner "Unhappiest lot of all" The Times. 9/5/91:16.). Many note the irony of this as the expansion professionalism in policing on a variety of fronts (education, organizational structure, accountability, technology) has altered some forces almost beyond recognition within the last decade (Reiner, ibid). The loss of confidence in the police is, in part, due to the steady increase in the high visibility of crime in the nation (drugs, organized crime, youth gangs, international and now national terrorism), and the sense, almost certainly false, that we have a more disorderly and violent society than at any time in our history. Certainly, since the abandonment of President Johnson's war on poverty, socio-economic divisions have widened and racism continues to be a major source of tension. In this context, the prognosis for community policing, hailed by the police themselves as 'smarter policing' and as the best promise yet for the professionalization of policing, is guarded, at best.

The contradictions in policing and conflicting needs of the community are clearly visible in New York City. During recent years under the leadership of recent New York Police Commissioners community policing emerged and met with considerable acceptance by the public in parts of the City. Yet, violence, gang activity, drug infestation of many neighborhoods, quality of life problems such as the presence of homeless people and panhandlers on the streets, harassment by squeegee wielders and new forms of violent crime such as car hijacking, continue. Currently in New York the pendulum has swung toward more proactive, aggressive policing. This has been marked by ongoing reports of police brutality and by a 37 percent increase between 1993 and 1994 in the number of civilian complaints of police brutality (The New York Times, 4/22/95:22). With brutality in policing still in 1995 a significant factor, it is difficult to claim that professionalism has taken hold in law enforcement.

Eradicating excessive use of force is the single most important internal problem police face (followed by the eradication of police corruption), if they are to continue on the long and arduous course toward professionalism. There have been many successes recently for law enforcement, especially in communications technology, in forensics, in advances in electronic information, in the utilization of sophisticated equipment, in inter-agency cooperation and exchanges of information, and in the development of a commitment to their peers, if not to professional conduct. But until attitudes of the police toward those that they serve and those that they police can be changed, police continue to make their own job more difficult and more dangerous. And professionalism for the police will not come about.

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VIII. LEGAL UPDATE

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LEGAL UPDATE

A. CAMPUS BARGAINING AND THE LAW: THE MANAGEMENT PERSPECTIVE

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I. INTRODUCTION

Decisions of import to the field of collective bargaining in higher education covered a range of topics in the past year. Traditional labor law issues of exhaustion of remedies, choice of forum and agency fees, as well as issues such as First Amendment rights and affirmative action, are discussed below. Generally, the ascendancy of the Republicans to Congress likely signals a slowdown in the promulgation of individual employee rights laws. At the same time, courts are struggling to balance the onslaught of litigation in areas such as sexual harassment and disability law with management's right to retain some discretion over its employment decisions. As the cases reveal, the unique characteristics of college and university campuses continue to challenge an appropriate balance of employer and employee rights. The cases are arranged loosely in order of court.

II. CASE LAW

A. Supreme Court

Retroactivity of the Civil Rights Act of 1991: Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc.

On November 21, 1991, the Civil Rights Act of 1991 ("Act") went into effect, providing plaintiffs with previously unavailable rights and remedies. What was not clear at that time, however, was whether those rights and remedies were available to plaintiffs who claimed that their civil rights had been violated prior to the effective date of the Act. In Landgraf v. USI Film Products[1] and Rivers v. Roadway Express, Inc.,[2] companion cases decided in April, 1994, the Supreme Court looked to common sense notions of "fairness" and held that sections 102 and 101 of the Act could not be invoked retroactively.

Landgraf addressed section 102 of the Act, which permits plaintiffs to recover compensatory and punitive damages for intentional violations of Title VII of the Civil Rights Act of 1964.[3] Rivers addressed section 101 of the Act, which overruled Patterson v. McLean Credit Union,[4] the earlier Supreme Court decision that had held that the Civil Rights Act of 1866 (section 1981) did not apply to post-hiring decisions because those were beyond, in the language of the statute, the right to "make and enforce contracts."[5]

After recognizing that rules of statutory construction supported both retroactivity and nonretroactivity,[6] the Landgraf Court relied ultimately on the law's presumption against retroactive legislation. The presumption, in turn, stemmed from "elementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[7] Because the Act did not contain sufficient evidence of any congressional intent to the contrary, the Court found that it would have been unfair to hold defendants responsible for payment of both compensatory and punitive damages for conduct where they had not previously known that such remedies would be available.

The Court set forth the following standard: whether retroactivity "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[8] Under this rule, the damages made available by section 102 could not be applied retroactively. In his dissent, Justice Blackmun objected that imposing greater damages for conduct that was already unlawful was not troublesome.[9]

Rivers presented an easier case for prospective application because section 101 created new substantive rights, rather than new remedies. The plaintiff's argument that the Court was really just reinstating the law as it should have been prior to Patterson was to no avail.[10]

The Court expressly left open the question of whether other provisions in the Act should be applied retroactively.[11] Nor did the Court reach the question that, with the passage of time, has become more relevant to Title VII litigants: should sections of the Act be applied retroactively to conduct that occurred both before and after November 21, 1991?[12] Thus, while Landgraf and Rivers provide some guidance regarding the broad concept of legislative retroactivity, they are not the last word for employers facing application of other provisions of recently enacted civil rights legislation.

Public Employees' Speech: Waters v. Churchill

In Connick v. Myers,[13] the Supreme Court fashioned a test for determining whether a government employee's speech may, consistent with the First Amendment, provide a basis for disciplining or discharging the employee.[14] In Waters v. Churchill,[15] a plurality of the Supreme Court addressed the extent to which an employer's discretion affects the Connick test.

Connick held that to be protected by the First Amendment, a public employee's speech must be on a matter of public concern, the employee's First Amendment interests must not outweigh the governmental employer's interest in effectively performing its services, and the speech must be a motivating factor in the discipline of the employee.[16] In Waters, respondent Churchill, a hospital nurse, was terminated after she complained about her employment to a fellow nurse. A dispute arose as to the specific complaints that Churchill made. Whereas she claimed that she was concerned about the hospital's "cross-training" policy in that it threatened patient care, the hospital alleged that Churchill had merely complained generally about her supervisor and her department.[17]

Recognizing that the government as employer has greater power to regulate speech than the government as sovereign, a plurality of the Court held that the hospital could, after taking "reasonable care" to investigate what was said, make its own decision to discipline the employee.[18] This constitutionally required "care" "need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision...."[19] Finding that the hospital had acted with sufficient care in investigating what Churchill had said, the Court stated that "[m]anagement can spend only so much of their time on any one employment decision."[20] Thus, the proper test is what the employer thought was said, not what the trier of fact ultimately determines to have been said.[21]

The Court also held that a government employer need not show, under Connick, that there has been an actual disruption of the employer's operations; rather, "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had."[22]

Following Waters, the Court set aside a Second Circuit decision holding that university officials had violated the First Amendment rights of Leonard Jeffries, the former chairman of the Black Studies department at City College of New York ("CCNY"), who had been demoted after making a controversial anti-Semitic speech.[23] On April 4, 1995, the Second Circuit reversed its earlier decision in light of Waters and held that Professor Jeffries' rights had not been violated.[24]

The Second Circuit focused on the aspect of Waters dealing with the disruptiveness of a government employee's speech. Because the defendants feared the ramifications of Jeffries' speech for the City University of New York, of which CCNY is a part, and because a majority of those involved in his demotion acted out of that fear, Jeffries' rights were not violated.[25] Interestingly, the court rejected an "academic freedom" argument that Jeffries, as a faculty member in a public university, deserved greater protection for his speech than the nurse in Waters. The court recognized the academic freedom concern, but held that it was not at risk because Jeffries had merely been demoted from his chairmanship. He remained a professor free to speak out and be heard.[26]

After-Acquired Evidence: McKennon v. Nashville Banner Publishing Co.

Christine McKennon, a thirty-year employee for the Nashville Banner Publishing Company, was terminated, according to her employer, as part of a reduction in force.[27] McKennon, sixty-two years old at the time, filed an Age Discrimination in Employment Act ("ADEA") claim. McKennon's deposition in the litigation revealed that she had copied confidential documents regarding the company's financial condition and showed the documents to her husband, allegedly because she thought she would be terminated because of her age.[28] Following the deposition, the company sent McKennon a letter stating that her conduct violated her job responsibilities and advising her (again) that she was terminated.

The Supreme Court addressed the extent to which the evidence that the company had acquired after McKennon's employment could be used to justify her termination. For summary judgment purposes, the employer conceded that it had discriminated on the basis of age.[29] The Court, balancing the employee's wrongdoing against the national employment policy mandated by the ADEA, held that after-acquired evidence does not bar compensation to employees in every instance.[30] The Court found that neither reinstatement nor front pay would be appropriate remedies now that the employee's misconduct had come to light. Nevertheless, the Court permitted recovery of back pay from the date of the unlawful discharge to the date of the discovery of the misconduct. "An absolute rule barring any recovery of backpay...would undermine the ADEA's objective of forcing employers to consider and examine their motivation, and of penalizing them for employment decisions that spring from age discrimination."[31] To employers facing a strong tide of discrimination litigation -- often following cost-cutting measures such as a reduction in force -- the outcome of McKennon was somewhat disappointing. The decision was not a complete victory for plaintiffs, however, whose misconduct will not be without effect on the ability to recoup damages in similar cases.

Honoraria For Government Employees: United States v. National Treasury Employees Union

In February, 1995, the Supreme Court struck down a much-debated law barring federal employees from accepting honoraria for articles or speeches.[32] The Ethics Reform Act of 1989 had prohibited the employees from accepting payment even for writings or lectures unrelated to the employees' work. The Court held that the law as applied to executive branch employees below GS-16 violated the First Amendment, noting that government employees had historically contributed to the "marketplace of ideas."[33] The dissent argued that the ban did not prevent employees from engaging in free speech; it merely denied them compensation for so doing.[34]

Labor Commissioner's Nonenforcement Policy/Section 301 Preemption: Livadas v. Bradshaw

In a case with choice of forum and § 301 implications, the Supreme Court struck down a Labor Commissioner's policy of nonenforcement of a state labor law constitutionally inadequate.[45] The court held that Lehnert had not clearly found extra-unit lobbying and litigation nonchargeable, and the union's designation of the activities as chargeable was therefore not of "constitutional significance."[46] Finally, the plaintiffs claimed that the notices were defective because they contained expenditures for categories of activities that were too ambiguous to allow intelligent assessment and because no precise amounts were listed.[47] The court found that the Supreme Court's "adequate information" requirement requires notice only of sufficient information to gauge the propriety of the fee. The requirement is limited in nature and does not require that the notice contain an exhaustive list of each activity in which the union will engage. The notice provided by the MEA was therefore constitutionally sufficient.[48]

Exhaustion of Remedies: Board of Trustees v. Myers

A jury verdict of $36,000 for a university professor was reversed by the District of Columbia Court of Appeals in January, 1995, when the court held that the professor had not exhausted his administrative remedies pursuant to his collective bargaining agreement.[49] In Board of Trustees v. Myers, the Board of Trustees of the University of the District of Columbia ("UDC") challenged the award, claiming that Professor Ernest Myers had not exhausted the grievance procedure under the UDC's master agreement with the UDC Faculty Assocation/NEA. Significantly, both parties agreed that Myers had requested that the union commence arbitration on his behalf, but the union claimed that it could not afford to support Myers. Myers's remedy was nevertheless not a lawsuit in the federal court, but a complaint against the union filed with the Public Employee Relations Board for breach of the duty of fair representation.[50]

Defining Disabilities: Tyndall v. National Education Centers

The 1990 Americans With Disabilities Act ("ADA")[51] has prompted a wave of disability litigation as employers, employees and courts alike struggle to define the limits of the law's requirements.[52] A troubling aspect of the ADA is the extent to which it requires "reasonable accommodation" of an employee whose ability to perform the essential functions of the job is itself at issue. The ADA protects "qualified individual[s] with a disability," or employees who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[53]

In the typical scenario, a disabled employee who has experienced difficulty complying with his or her job requirements will allege that had the employer only done more in the way of accommodation, the employee could somehow have continued to perform the job. An employer who has provided some (and often considerable) accommodation begins to wonder when it can lawfully refuse to do more.

Recent decisions relying on the plain language of the ADA provide some direction: employees who cannot perform the essential functions of the job with or without reasonable accommodation are not entitled to protection. In Tyndall v.

National Education Centers,[54] Mary Tyndall, a part-time instructor in the medical assisting program at Kee Business College, suffered from lupus. Kee was aware of Tyndall's disability at the time she was hired. The school continually accommodated the disability, permitting her sick leave and allowing her to come in late, leave early and take breaks.[55] When, after a series of leaves of absence, Kee refused to permit Tyndall to take more leaves, she was asked to resign. Tyndall filed suit, alleging violations of the ADA and the Virginians with Disabilities Act.[56]

The Fourth Circuit held that "[i]n addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. [A] regular and reliable level of attendance is a necessary element of most jobs."[57] Thus, because Tyndall could not teach her assigned courses and spend time with her students from home, "her frequent absences rendered her unable to function effectively as a teacher."[58] This was true despite the fact that she had received good performance evaluations. Tyndall therefore could not meet the threshold requirement of proving that she was a "qualified" employee under the ADA, and summary judgment in Kee's favor was affirmed.[59]

More recently, the Fourth Circuit has held that reasonable accommodation under the ADA does not require an employer to provide an employee indefinite leave and to hold his position open for his return. The employer is not required to reasonably accommodate the employee's future ability to perform the essential functions of the job.[60]

Affirmative Action: United States v. Board of Education of Township of Piscataway

The phrase "affirmative action" has been uttered increasingly since the installation of the new Congress -- both by those who fear its demise and by those who believe that its usefulness (if any) has been outlived. Several recent cases have addressed particular affirmative action issues in the education arena. A three-judge panel of the Third Circuit recently heard oral argument in United States v. Board of Education of Township of Piscataway,[61] in which the Piscataway, New Jersey school board laid off white teacher Sharon Taxman and hired black teacher Debra Williams. The two had the same seniority and credentials. The rub is that the decision was made not in the name of remedying past discrimination, but to maintain diversity. In its appeal, the school board argued that its decision was not precluded by past Supreme Court affirmative action decisions because, unlike the employers in those cases, the board had not set aside any specific number of positions for minority employees or overridden any seniority rights.[62]

Perhaps the most controversial aspect of the case is the Department of Justice's position. The Department originally condemned the school board's decision and successfully backed Taxman in her reverse discrimination claim in the District Court. The Department has since sought to switch sides and to file an amicus brief asserting that Title VII permits a school board to factor race into a layoff decision.[63]

Podberesky v. Kirwan

The Fourth Circuit recently struck down a University of Maryland affirmative action program that had been open only to African American students. In Podberesky v. Kirwan,[64] the court found that the scholarship program did not meet the strict scrutiny review necessary to sustain the program on equal protection grounds. The school did not show that there was a strong basis for concluding that remedial action was necessary, and the program was not narrowly tailored. The school's poor reputation in the African American community and the perceived hostile climate on campus were not sufficient to justify the exclusion of non-African Americans from the scholarship program.[65]

C. United States District Courts

More Affirmative Action: Smith v. Virginia Commonwealth University, Deli v. University of Minnesota and Stanley v. University of Southern California

Three recent United States District Court decisions deferred to university decision-makers regarding salaries of male and female employees. In Smith v. Virginia Commonwealth University,[66] male faculty members brought a reverse discrimination suit after the university had increased the salaries of certain female employees. Following a salary equity study that revealed that female faculty members at the school earned on the average $1,354 less than their male counterparts, VCU budgeted $335,000 for the 1991-92 fiscal year to increase the salaries of certain female faculty members.[67]

Under Johnson v. Transportation Agency,[68] public employers "may institute voluntary gender-based affirmative action programs when there is a manifest imbalance in traditionally segregated job categories."[69] The plaintiffs in Smith argued that VCU's salary increase plan did not meet the Supreme Court's requirements for affirmative action programs after Johnson.[70] The court distinguished Johnson-type cases involving hiring, promotions, and access to training programs, from the case of a salary increase plan resulting from a statistical disparity in compensation. VCU's plan did not unnecessarily trammel the rights of the male professors, the court found, because the male professors were not harmed in any way. Their salaries were not reduced and their potential for future salary increases remained unchanged. Likening the case to an Equal Pay Act case, the court held that "[u]nequal compensation, where the basis for it rests solely on gender, is never appropriate."[71]

In Deli v. University of Minnesota,[72], the United States District Court for the District of Minnesota similarly deferred to a university's salary decision, upholding a school's decision to pay a women's gymnastics head coach less than the head coaches of men's football, hockey and basketball. The differential treatment was permitted because it was based on factors other than gender.

Interestingly, plaintiff Katalin Deli did not claim that she was treated differently because she was a woman, but because she coached a women's sport. Her Title VII claim thus failed because she was not claiming discrimination "because of...sex," but because of who she supervised; her Equal Pay Act claim failed for similar reasons. Further, even if she had alleged discrimination in pay based on her own gender, she would not have defeated summary judgment, because she failed to raise a genuine issue of material fact that her position was substantially equal to the positions that paid more.[73]

And in Stanley v. University of Southern California,[74] a United States District Court dismissed the Equal Pay Act and Title IX of the Education Amendments of 1972 claims of a female women's basketball coach who sought a salary equal to that of the men's basketball coach.

Sexual Harassment: Shub v. Hankin

The balance between an alleged sexual harassment victim's rights and the rights of the accused harasser is especially delicate on the college campus. The role of the professor as mentor, reputational interests, and the fish-bowl nature of the campus itself, for example, all require schools to step carefully as they implement sexual harassment policies. In Shub v. Hankin,[75] a tenured associate professor, sued Westchester Community College after he was temporarily suspended pending the outcome of a sexual harassment investigation. Shub sought compensatory and punitive damages and attorneys' fees and costs for his claimed denial of First and Fourteenth Amendment rights.

Shub was represented by the Westchester Community College Federation of Teachers ("Federation"). In 1989, a neutral arbitrator appointed under the collective bargaining agreement found Shub guilty of conduct unbecoming a member of the staff, and he was suspended for one semester. In 1994, new allegations of harassment arose. Shub sought to enjoin the college from proceeding against him pursuant to the collective bargaining agreement; he claimed that the college should have been required to proceed pursuant to sexual harassment procedures it had developed in accordance with federal regulations applicable to schools receiving government assistance.[76]

The court found that, even assuming a deprivation of a property right (he was not terminated), Shub had failed to show that post-suspension process in compliance with a collective bargaining agreement violated the Fourteenth Amendment. There was no constitutional violation for choosing one internal procedure over another, and the applicable federal regulations did not preclude discipline by a collective bargaining agreement.[77]

In a similar case, the United States Supreme Court refused to hear the claim of a Maine college instructor who claimed that he was "sexually obsessive" and therefore disabled under the Rehabilitation Act of 1973.[78]

And, in what is being called "the first case of its kind at Boston University," a professor was fired and barred from campus in March, 1995 following a university hearing committee finding that the professor had sexually assaulted another faculty member, sexually harassed students and provided alcohol to underage students.[79] In return, the professor has instituted his own federal lawsuit, claiming discrimination on the basis of a mental handicap. The alleged handicap: he takes depression medication that loosens his inhibitions, and student complaints of his behavior should have prompted the university to help him.[80]

D. State Courts

Fair Representation/Exclusive Jurisdiction: Anderson v. California Faculty Association

A California appellate court recently considered whether it had jurisdiction to hear both a claim against an employer for breach of a collective bargaining agreement and a claim against a union for breach of the duty of fair representation.[81] In Anderson v. California Faculty Association, three tenured university professors were laid off. They sued their employer, Humboldt State University, for, inter alia, breach of their employment contract, and they sued the California Faculty Association for failing to file grievances in response to their layoff notices. The court held that in this "hybrid" case, the court could consider only the claims against the university. The duty of fair representation was defined in the state's Higher Education Employer-Employee Relations Act ("HEERA"), administered by the Public Employment Relations Board ("PERB"). The court stated: "We perceive nothing in the HEERA or the legislative history that suggests an implicit grant of jurisdiction to the state courts over a union's alleged unlawful labor practice merely because the aggrieved employee has chosen state court action to enforce his employment contract."[82] The PERB therefore had exclusive jurisdiction over the claim against the union.[83]

Campus Speech Codes: Stanford University

The battle over campus anti-harassment codes continues to rage, and it is often difficult to tell whether it is the First Amendment advocates or the proponents of political correctness who are wearing the white hats. Stanford University has recently decided that it will abandon its speech code rather than continue to defend it in litigation.[84] The code had forbidden face-to-face epithets denigrating a person's race, religion or sex. The Santa Clara County Superior Court struck the code down because it banned speech on some bases but not on others. Interestingly, the private university students challenged the code pursuant to a 1992 state law that conferred on the students the same First Amendment rights enjoyed by public college and university students. Stanford University President Gerhard Casper lamented the part of the court's decision that upheld the law, claiming that it "represented a far greater curtailment of First Amendment rights than Stanford's anti-harassment policy ever could."[85]

E. NLRB

Election Interference/Discrimination: College of Mount Saint Vincent

The National Labor Relations Board recently held that the College of Mount Saint Vincent had interfered with a Service Employees Local election by interrogating employees concerning union activities, creating the impression of surveillance of their activities and threatening employees who supported the union with discharge or replacement by outside contractors. A new election was ordered.[86] The Board also held that the college had violated the LMRA by terminating the union's most active adherent,but that the LMRA was not violated by the discharge of a maintenance employee who refused to repair a boiler.[87]

III. LEGISLATION

The final regulations of the Family and Medical Leave Act of 1993 ("FMLA")[88] took effect April 6, 1995.[89] The regulations change certain employer obligations under the FMLA and provide explanation for others. For example, the regulations provide further guidance as to the definition of a "serious health condition" entitling an employee to leave, expand the definition of a "health care provider," modify the instances in which an employer can retroactively designate leave and specifically provide that leave for a worker's compensation injury or under a disability benefit plan can be simultaneously designated as FMLA leave. In a separate edict, the IRS has issued its Bulletin No. 1994-51, outlining the relationship between the FMLA and the Consolidated Budget Reconciliation Act of 1986 ("COBRA"). The bulletin states that an FMLA leave is not a "qualifying event" for COBRA purposes.

Overall, wading through the FMLA waters remains treacherous even after the promulgation of the final regulations, and employers should proceed carefully as they implement leave policies.

IV. EXECUTIVE ORDER

Sanctions For Striker Replacement: Executive Order No. 12954

On March 8, 1995, President Clinton issued Executive Order No. 12954, permitting debarment of federal contractors who permanently replace striking employees.[90] The Chamber of Commerce and employer groups have filed suit in federal court challenging the executive order, invoking the separation of powers doctrine.[91] The Justice Department has moved for dismissal of the challenge, arguing that the plaintiffs failed to allege a case or controversy ripe for judicial review.[92]

ENDNOTES

1. __ U.S. __, 114 S. Ct. 1483 (1994).

2. __ U.S. __, 114 S. Ct. 1510 (1994).

3. 42 U.S.C. §§ 2000e et seq.

4. 491 U.S. 164 (1989).

5. 42 U.S.C. § 1981.

6. __ U.S. __, 114 S. Ct. at 1496.

7. *Id.* at 1497.

8. *Id.* at 1499.

9. *Id.* at 1510 (Blackmun, J., dissenting).

10. 114 S. Ct. at 1516.

11. 114 S. Ct. at 1455; *see* *Vernon v. Cassadaga Valley Central School District*, No. 94-7482 (2d Cir. Mar. 8, 1995) (new ADEA statute of limitations under the Act retroactive).

12. For an example of one court's treatment of this issue, see *Park v. Howard University*, 863 F. Supp. 14 (D.D.C. 1994) (discrimination occurring both before and after the effective date of the Act can be remedied by compensatory damages under § 102).

13. 461 U.S. 138, 103 S. Ct. 1684 (1983).

14. 461 U.S. at 142, 103 S. Ct. at 1687.

15. __ U.S. __, 114 S. Ct. 1881 (1994).

16. *Connick*, 461 U.S. at 142, 103 S. Ct. at 1687.

17. *Waters*, __ U.S. __, 114 S. Ct. at 1882-83.

18. *Id.* at 1886-89.

19. *Id.* at 1889.

20. *Id.* at 1890.

21. *Id.* at 1882.

22. __ U.S. __, 114 S. Ct. at 1887, 1890.

23. Harleston v. Jeffries, __ U.S. __, 115 S. Ct. 502, 503 (1994), vacating and remanding Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994).

24. Jeffries v. Harleston, No. 93-7876, 1995 U.S. App. LEXIS 7639 (2d Cir. Apr. 4, 1995), reprinted at 67 Daily Lab. Rep. (BNA) E-24 (4/7/95).

25. Id., 67 Daily Lab. Rep. (BNA) at E-25-26.

26. Id. at E-26-27. For other cases involving the balance of a university's right to effectively operate and the university employee's First Amendment rights, see Hanton v. Gilbert, 36 F.3d 4 (4th Cir. 1994); Smart v. Board of Trustees, 34 F.3d 432 (7th Cir. 1994); Aldrich v. Knab, 858 F. Supp. 1480 (W.D. Wash. 1994); Gardetto v. Mason, 854 F. Supp. 1520 (D. Wyo. 1994).

27. McKennon v. Nashville Banner Pub. Co., __ U.S. __, 115 S. Ct. 879, 66 Fair Emp. Prac. Cas. (BNA) 1192 (1995).

28. Id., 66 Fair Emp. Prac. Cas. (BNA) at 1193.

29. Id. at 1194.

30. Id.

31. Id.

32. United States v. National Treasury Employees Union, __ U.S. __, 115 S. Ct. 1003, 1995 U.S. LEXIS 1624 (1995).

33. Id., 1995 U.S. LEXIS 1624 at *6-46.

34. Id., 1995 U.S. LEXIS 1624 at *46-69 (Rehnquist, J., dissenting).

35. __ U.S. __, 114 S. Ct. 2068, 146 L.R.R.M. (BNA) 2513 (1994).

36. Livadas, __ U.S. __, 114 S. Ct. 2068, 146 L.R.R.M. (BNA) at 2515-16.

37. Id., 146 L.R.R.M. (BNA) at 2517.

38. Id. at 2519-2521.

39. 30 F.3d 723 (6th Cir. 1994).

40. 30 F.3d at 724-25.

41. Id. at 724; MICH. COMP. LAWS § 423.211. See Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 106 S. Ct. 1066 (1980); Abood v. Detroit Board of Educ., 431 U.S. 209, 97 S. Ct. 1782 (1977) (First Amendment prohibits union from spending part of the required fees to contribute to political candidates or to express political views unrelated to the union's duties as the exclusive bargaining representative). Constitutional requirements of charging an

agency fee include providing the nonunion employees with adequate explanation of the basis for the fee, a reasonable opportunity to challenge the amount of the fee before an impartial decisionmaker, and placement of the fee in escrow while the dispute is pending. Jibson, 30 F.3d at 724.

42. Id. at 725.

43. 30 F.3d at 725-28.

44. Id. at 730.

45. Jibson, 30 F.3d at 732; Lehnert, 500 U.S. 507, 111 S. Ct. 1950 (1991).

46. Jibson, 30 F.3d at 732.

47. Id. at 732.

48. Id. at 732-36.

49. Board of Trustees v. Myers, 148 L.R.R.M. (BNA) 2494 (D.C. Cir. 1995).

50. Board of Trustees, 148 L.R.R.M. (BNA) at 2495-97.

51. 42 U.S.C. § 12101 et seq.

52. In June, 1994, disability-rights groups announced their intent to escalate a litigation campaign to force compliance with the ADA. 104 Daily Lab. Rep. (BNA) A-12-13 (6/2/94).

53. 42 U.S.C. § 12111(8).

54. 31 F.3d 209 (4th Cir. 1994).

55. 31 F.3d at 211.

56. Id. at 211-12.

57. Id. at 213 (citations omitted).

58. Id.

59. Id. at 214, 216. The EEOC has recently issued a 56-page guideline on the definition of "disability" under the ADA. 51 Daily Lab. Rep. (BNA) AA-1, E-31 (3/16/95).

60. Myers v. Hose, __ F.3d __, 1995 U.S. App. LEXIS 6275 (4th Cir. Mar. 29, 1995).

61. Nos. 94-5090 and 94-5112 (3d Cir.) (oral argument Jan. 24, 1995); see 16 Daily Lab. Rep. (BNA) A-5 (1/25/95).

62. Id., 16 Daily Lab. Rep. at A-5-6.

63. Id. at A-7.

64. 38 F.3d 147 (4th Cir. 1994).

65. 38 F.3d at 152-158; see also Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Tex. 1994) (law school admission program that favored black and Mexican American students struck; program was unlawful because it not only considered race a "plus" factor (which would have been lawful), but it also required the school to separately evaluate pools of applicants).

66. 856 F. Supp. 1088 (E.D. Va. 1994).

67. 856 F. Supp. at 1089.

68. 480 U.S. 616, 107 S. Ct. 1442 (1986).

69. 480 U.S. at 628, 107 S. Ct. at 1450; see also United Steelworkers v. Weber, 443 U.S. 193, 197, 99 S. Ct. 2721, 2724 (1979).

70. Smith, 856 F. Supp. at 1092; see Johnson, 480 U.S. at 637-40, 107 S. Ct. at 1454-46.

71. Id. at 1092-94.

72. 863 F. Supp. 958 (D. Minn. 1994).

73. 863 F. Supp. at 959-962.

74. No. CV-93-4708JGD (C.D. Cal. 3/9/95), reported in 50 Daily Lab. Rep. (BNA) A-5 (3/15/95).

75. 869 F. Supp. 213 (S.D.N.Y. 1994).

76. 869 F. Supp. at 213-216; 34 C.F.R. § 1068.

77. 869 F. Supp. at 216-18. For a case overturning a university's decision to terminate an alleged harasser, see Starishevsky v. Hofstra University, 612 N.Y.S.2d 794 (Supp. 1994).

78. Winston v. Maine Technical College System, 631 A.2d 70, 72 (Me. 1993), cert. denied, Winston v. Maine Technical College System, __ U.S. __, 114 S. Ct. 1643 (1994). Compare Winston with the case of a former University of Maine professor who, following a March, 1995 federal jury verdict, was awarded $805,000 after being fired for alleged sexual harassment of a student. The verdict also permitted recovery of attorneys' fees and costs. The university plans to appeal. Fired professor awarded $805,000, Boston Globe, Mar. 12, 1995, at 41.

79. Alice Dembner, BU fires accused professor, Boston Globe, Apr. 4, 1995, at 23.

80. Id.

81. Anderson v. Calif. Faculty Ass'n, 146 L.R.R.M. (BNA) 2468 (Cal. Ct. App. 1 Dist. 1994).

82. Anderson, 146 L.R.R.M. (BNA) at 2469-73.

83. Id.

84. Christopher Shea, Stanford Gives Up Legal Battle to Keep Its Hate-Speech Code, The Chronicle of Higher Education, Mar. 24, 1995, at A40.

85. Id.

86. College of Mount Saint Vincent, 316 NLRB No. 30, 148 L.R.R.M. (BNA) 1245 (Jan. 27, 1995).

87. Id., 148 L.R.R.M. (BNA) at 1245-46.

88. 29 U.S.C. § 2601 et seq., 29 CFR Part 825.

89. 60 Fed. Reg. 2180 (1995) (to be codified at 29 C.F.R. Part 825), corrections at 60 Fed. Feg. 16382 (1995).

90. "Ensuring the Economical and Efficient Administration and Competition of Federal Government Contracts," 60 Fed. Reg. 13023 (1995); see proposed rule at 60 Fed. Reg. 16354 (1995).

91. Chamber of Commerce v. Reich, No. 95-0503 GK (D.D.C.) (65 Daily Lab. Rep. (BNA) E-1 (4/5/95)).

92. Id.

LEGAL UPDATE

B. CAMPUS BARGAINING AND THE LAW: THE AAUP'S PERSPECTIVE

Three Heartening Legal Developments

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INTRODUCTION

Among the developments in higher education law in the past year, most capably surveyed by Susan Lipsitz in the companion paper, are three that particularly hearten AAUP. This analysis will concentrate on these positive developments. All three are federal actions: one Executive Order and two Supreme Court decisions.

Unwelcomed changes certainly occurred in the past year, notably the exclusion of workload from bargaining in Ohio public colleges and universities.[1] But the year, overall, was generally one in which the courts showed some sympathy to AAUP's concerns. Positive developments in the area of sexual harassment include concern for due process and academic freedom, and the courts have muted some of the worst interpretations of the First Amendment. Recent judicial appointments on the Supreme Court and in the lower federal courts are making an impact on justice in America.

EXECUTIVE ORDER ON PERMANENT REPLACEMENT OF STRIKERS

President Clinton issued an Executive Order on March 8, 1995, prohibiting federal contractors from permanently replacing striking employees.[2] Behind this bare statement is an action thriller that involves a vast struggle of major national interests. All three branches of government have roles. What Clinton accomplished by executive fiat, the Congress is trying to take away. To complicate the picture further, the Chamber of Commerce and the National Association of Manufacturers have filed suit in federal court.

The United States is one of the few countries in the industrialized world in which striking employees may be permanently replaced. The AFL-CIO made legislation banning the permanent replacement of striking employees one of its highest priorities in recent years. While the House of Representatives passed a bill on June 15, 1993 (H.R. 5) with a vote of 230 to 190, the Senate declined in 1994 to go along.

Enter the Clinton Executive Order, first announced in February at the annual Bal Harbor meeting of the AFL-CIO Executive Committee. The premise is that the President controls federal procurement, and he has decided that goods and services produced with permanent replacements are likely to be inferior. Federal policy, he asserts, is to promote industrial peace in America, and the permanent replacement of strikers undermines this goal.

As Labor Secretary Robert Reich wrote to Senator Kennedy on March 1:

> Federal contractors must have stable and productive labor-management relationships if they are going to produce the best quality goods in a timely and reliable way. The use or the threat to use permanent replacement workers destroys any opportunity for cooperative and stable labor-management relations. Research has found that strikes involving permanent replacements last seven times longer than strikes that don't involve permanent replacement....[3]

The preamble to the Executive Order amplifies this theme: "By permanently replacing its workers, an employer loses the accumulated knowledge, experience, skill, and expertise of its incumbent employees. These circumstances then adversely affect the businesses and entities, such as the Federal Government, which rely on that employer to provide high quality and reliable goods or services."[4] The Department of Labor used less loftly language, indeed, an allusion to the baseball strike, in an explanation of the Executive Order: "We don't want rookies and minor leaguers making tires for Desert Storm." Labor Department Information Sheet on Clinton Executive Order.[5]

Behind these quotes are several subthemes. First, the President needs, for the most part, a statutory basis for issuing an executive order. He cannot just sit back and invent binding requirements, because Congress, not the President, is supposed to make laws. The statute behind the new Executive Order is the federal Procurement Act, under which the government buys paperclips and aircraft carriers, and hires consultants to study every imaginable subject. The Procurement Act also undergirds the Executive Order that is probably the best known in higher education, Executive Order 11246. Executive Order 11246 bars discrimination and requires affirmative actions by federal contractors and grantees. Perhaps the nickname of the new one -- Executive Order 12954 -- will become as well known in colleges and universities, but perhaps not.

The second subtheme is the impact on the tire industry. Bridgestone/Firestone has become notorious for hiring 2,300 permanent replacement workers after 4,000 United Rubber Workers struck the Decatur, Illinois plant last July. President Clinton and Secretary Reich both have criticized the company. Now the Executive Order makes Bridgestone vulnerable to debarment from future contracts to sell tires to the federal government -- for Desert Storm or any other purpose.

What the Executive Order Does. Let me now describe the Executive Order itself. The short order occupies just over two pages in the Federal Register; it has been supplemented by three pages of proposed regulations from the Department of Labor. After a flowery preamble, the gist of the order states that any federal contractor that replaces permanent strikers is subject to two possible adverse actions. Existing contracts may be terminated immediately, with payment for work done through the termination date. Second, the contractor may also be debarred from bidding on future contracts as long as the labor dispute exists. All this applies to contracts over $100,000; smaller ones are exempt.

There are, of course, several twists and turns in interpreting the Executive Order. I hasten to add that we have only now proposed rules from the Department of Labor. The final rules may well reroute some of these issues. The debarment is limited to the "organizational unit" of the federal contractor in which employees were replaced. To construct a crude example, say a university's physics department had federal contracts exceeding $100,000. The faculty went out on strike and were all permanently replaced. Because the faculty members in physics were replaced, the government could terminate the contract and also debar the department from receiving future contracts for the duration of the strike. It appears, however, that the debarment may only cover the physics department, if that is the locus of the federal contract.

Now what if the only faculty members permanently replaced were in the English Department? If the federal contract is limited to physics, there may well be no contract termination or debarment. Although the university has replaced striking faculty, it has not replaced those physics professors who are working for the government. The government will not, under the proposed rules, debar an employer for permanently replacing workers in an "organizational unit" that does not perform federal contract work. I note, however, that many research grants run between the federal government and an institution, as institutions commonly observe when they are removing a principal investigator. The application of the concept "organization unit" to universities will certainly require clarifying through rules or cases.

Here's another wrinkle for higher education. The Labor Department's proposed rules would tolerate the permanent replacement of anyone who is a supervisor. Section 270.1(h). Are faculty members supervisors? Far more attention has been devoted to the question of whether they are managers under the National Labor Relations Act. But, in light of the recent Supreme Court ruling that licensed practical nurses are supervisors (which I discussed here last year), we risk the possibility that some courts may find many faculty members to be supervisors as well.[6]

Another twist concerns the legality of the strike. Some strikes may be illegal, notably for public employees in some states. What if illegal strikers are permanently replaced? The Executive Order seeks to protect lawfully striking employees from permanent replacement. The proposed rules define "lawfully striking employees" as anyone engaging in a strike that has not been "finally adjudicated to be unlawful under any applicable federal, state, or local law." Section 270.1(k). So until the final court ruling that a strike was illegal, the Labor Department may entertain complaints involving allegedly illegal strtikes.

Curiosity prompts some additional questions about the impact of the Executive Order. How many people are covered, how many contracts? What is the impact of limiting the Order to contracts over $100,000? Labor Secretary Reich has estimated that the order will affect one or two federal contractors each month. In 1994, American business had 454 strikes, about 30 of which involved permanent replacements. An unknown portion of these were federal contractors. Of all the federal dollars spent on contracts, about 90 percent are in contracts over $100,000. In higher education, all major research universities easily have federal contracts in excess of $100,000. To cite some examples familiar to AAUP, the University of Cincinnati, the University of Medicine and Dentistry of New Jersey, Rutgers University, and Wayne State University each had federal contracts in 1991 worth between $30 and $50 million. Teaching institutions may have contracts for specific projects and some have longstanding relationships with nearby military bases or other federal installations. Many historically black institutions received targeted federal research contracts over this $100,000 threshold. So while it is difficult to say just what colleges and universities will be affected by the Executive Order, the answer is many. Executive Order 11246 has a lower $10,000 threshold, so it reaches many more.

Opposition to the Executive Order. Opponents of the Executive Order, both inside and outside government, have not sat idly by. They have mounted attacks in both houses of Congress and in the courts. These are on-going stories, with final outcomes yet to be determined.

Congressional Opposition. As soon as the Executive Order was issued, Senator Kassebaum introduced an amendment in the Senate against it. She attached this to a Department of Defense supplemental appropriations measure. Debate raged, with Senators Kennedy, Byrd, Simon, Harkin, and Feingold among those filibustering to support the Executive Order. On March 15, after Republicans fell two votes short ending the debate, they abandoned the amendment to kill the Executive Order. Senator James Jeffords was, according to an aide, stuck in an elevator during the vote, but this small side drama did not affect the outcome. Democratic Senators Bumpers, Exon, Hollings, Nunn, and Pryor all opposed President Clinton in their votes on the measure.

Action turned next to the House of Representatives. Hearings were held on March 5 before the House Economic & Educational Opportunities Committee. Representatives of the Chamber of Commerce and the National Association of Manufacturers deplored the impact of the Executive Order on business and railed about abuse of presidential power. The administration declined to appear at the hearings, where the lone witness testifying in favor of the Executive Order was Roger Gates, the president of Rubber Workers Local 713 in Decatur, Illinois, who was permanently replaced along with two thousand of his co-workers.

As to legislation, the House included a provision in the much-touted rescission bill that would bar the administration from spending federal monies to enforce Executive Order 12954 for the fiscal year. The House approved the measure.

The House and the Senate often pass different versions of legislation, and this was no exception. The Senate rescission bill omitted any reference to the Executive Order. The job of reconciling the differences falls to a conference committee, which met in May on the rescission bill. The rescission legislation that Congress sent to the President ultimately did not contain the provision barring expenditures for enforcement of the new Executive Order. Further Congressional opposition may be expected.

Opposition in the courts. In March the Chamber of Commerce and other groups promptly filed suit in federal court against the Executive Order. They argued, in effect, that the President cannot usurp the role of Congress and the NLRB in regulating labor/management relations. The legal issues turn on the proper allocation of authority between the executive and legislative branches of government. If permanent replacement is legal under federal law, why does the President have the power to forbid the practice in federal procurement contracts? The Clinton administration points to similar exercises of presidential authority by his Republican predecessor. President Bush issued two executive orders in the area of labor relations, one concerning agency fees and the other involving hiring in the construction industry. Both dealt with subjects already addressed in federal law. President Clinton argues that, if Bush acted properly, so has he, albeit their orders pleased rather different constituencies. Clinton's Executive Order is supported by his findings that the federal government will function better if it does not have to rely on goods and services provided by replacement workers.

While they are not relevant to the judicial proceedings, the obvious political dimensions of Executive Orders must be mentioned. Although in court Clinton is pointing to the Executive Orders issued by Bush in the area of labor relations, Clinton revoked both of them shortly after assuming office. And it is commonly understood that his order on permanent replacements will gain political advantage with organized labor.

Oral argument in the court case was heard on April 20 before a federal district judge in the District of Columbia. Her ruling -- whatever it is -- will certainly land in the court of appeals.

I conclude this discussion with some observations. The Executive Order on permanent replacement of strikers does not bind the federal government, only government contractors. Remember that the contemporary history on permanent replacements was defined by President Reagan's replacement of the striking PATCO air traffic controllers. What if, to strain the imagination, the Executive Order had been in effect at the time and the strike had been legal? The irony is that it would have had no impact, because the controllers were employees rather than federal contractors. Striking faculty members have been permanently replaced only once, as far as I know. Whether the University of Bridgeport had federal contracts exceeding $100,000, and whether any faculty within the contract's "organizational units" were permanently replaced, I cannot say. But the Executive Order remains a step forward, if it survives the political and legal challenges.

Let me turn more briefly to two other positive developments. Both are Supreme Court decisions and hence more final than the turbulent ongoing debate over the Executive Order.

FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES

While not all the news on the First Amendment front has been good lately, one development stands out. The Supreme Court's February decision in United States v. National Treasury Employees Union, 63 U.S.L.W. 4133 (2/21/95), vindicates the First Amendment interests of federal employees. The direct impact of the ruling is limited to the federal civil service, but it likely will have indirect positive effects on the rights of other public employees.

The facts of the case are simple. Congress passed a law forbidding federal government employees from accepting payment for making speeches or writing articles. It did not matter whether the subject matter touched on the individual's government job. The plaintiffs included a mail handler who wanted to give speeches on the Quaker religion and a government microbiologist who moonlighted as a dance critic. While these people were allowed to engage in their outside activities, they were prevented from receiving any compensation. The law contained many exceptions. Payment for fiction writing was permitted. Payment for a book, rather than an article, was permitted. Payment for a *series* of speeches or articles, rather than just one, was also permitted. Payments to performing artists, rather than writers and lecturers, was permitted.

The government argued that outside honoraria could interfere with the efficiency of the public service. "The Government's underlying concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities" (Page 4138). No evidence of misconduct, however, was offered. Justice Stevens, writing for the Court's majority, expressed doubt about the possibility of corruption when the subject matter is far removed from the employee's work responsibilities. Moreover, the fact that the ban targeted expressive activity was troublesome.

"Imposing a greater burden on speech than on other off-duty activities assumed to pose the same threat to the efficiency of the federal service is, at best, anomalous (At 4139). The various exceptions to the ban also undermined the government's arguments about protecting the integrity of the civil service.

The decision strongly reaffirms the expressive rights of government employees, a result not always attained these days. Contrast the NTEU decision, for example, with Waters v. Churchill, 114 S.Ct. 1881 (1994), which involved the dismissal of a nurse for criticizing hospital practices. In Waters the Court gave deference to the hospital's concern about disruption. The plurality opinion in Waters stated, "we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." (Quoted in NTEU at 63 U.S.L.W. at 4141). The Court thus acknowledged that public employees have, in some respects, more limited rights than members of the public.

In NTEU, the Court appears to have narrowed this focus further. It now seems that groups of employees may receive more protection that individuals. "As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification." (63 U.S.L.W. at 4142). Herein lies the crux of the distinction between Waters and NTEU. When the Court assesses a government rule that impairs the First Amendment rights of a large group of people, it will look harder than when it reviews a personnel action affecting only one person. Should the First Amendment have more "teeth" when the rights of many people are at stake? The essence of the First Amendment is individual liberty, so one would hope that the individual claim would be treated as seriously as the group claim. Regardless, the NTEU decision leaves us with flowery language on the First Amendment. In higher education, the decision may bear on rules at public colleges and universities restricting the sources of faculty members' outside income. Whatever its future application (and AAUP will surely find some), it is a good decision to have in hand.

DISCRIMINATION AGAINST THE EMPLOYEE WHO HAS ENGAGED IN MISCONDUCT

My final cheery decision of the hour is McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). Christine McKennon was 62 years old when she lost her job at the Nashville Banner Publishing Company. The company claimed that cost considerations motivated its staff reductions, but McKennon believed that she was the victim of age discrimination. She filed suit under the Age Discrimination in Employment Act.

Pre-trial depositions are a normal feature of such lawsuits. McKennon testified in her deposition that in her final year of employment she had copied confidential company financial documents. She took them home and showed them to her husband. A few days after the deposition, the company notified her that the removal and copying of the documents constituted serious misconduct warranting termination. In the litigation, the company argued that its newly discovered evidence of misconduct automatically defeated McKennon's right to any remedy even if the company had discriminated against her.

The courts of appeals were split on the treatment of so-called "after-acquired evidence." The Supreme Court granted review in McKennon to assess the conflict on the following abstract question. Can an employee who has been discriminatorily discharged receive relief from the courts even when the employer later discovers some misconduct that, had it been known earlier, would have justified termination? Writing for the Court in a unanimous ruling, Justice Kennedy stressed the important social interests in eradicating discrimination. Lawsuits by private individuals under the Age Discrimination in Employment Act and Title VII may reveal deep-rooted injustices in an employer's practices. Thus the larger social goals of discrimination litigation justify awarding some relief to the plaintiff who had engaged in misconduct. The Court explains that the relief must be limited -- reinstatement and front pay would not ordinarily be available to the plaintiff who is discovered with "unclean hands." Instructing the lower courts to examine these disputes on a case-by-case basis, the Court suggested that backpay might be available from the date of discharge to the date that the new information of misconduct was discovered.

So now we know that you do not have to be a saint to be protected from discrimination. Some observers say that the outcome was the only logical one that the Court could have reached. The next interesting question is now whether the ruling will be extended outside of the area of discrimination. What about after-acquired evidence in an arbitration proceeding? In a breach of contract case? Observers are predicting that the doctrine may *not* apply to these other settings, where "unclean hands" may traditionally bar relief. Whatever the impact outside of the discrimination area, McKennon remains good news.

CONCLUSION

The coming year will certainly bring new developments on the Executive Order. Whether developments on that front or others will dampen my general optimism remains to be seen.

ENDNOTES

1. American Association of University Professors, Central State University Chapter v. Board of Trustees, Central State University, No. 94-1811, Supreme Court of Ohio, mandamus denied in April 1995.

2. 60 Fed. Reg. 13023 (3/13/95). The best source of information about the Executive Order and the Congressional reactions to it is the Daily Labor Report (BNA). Throughout March and April, 1995, the publication ran frequent stories about the situation, from which much of this analysis is drawn.

3. 65 Daily Lab. Rep. (BNA) E-1 (3/8/95).

4. 60 Fed. Reg. 13023 (3/13/95).

5. Published at 65 Daily Lab. Rep. (BNA) E-3-4 (3/9/95).

6. National Labor Relations Board v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778 (1994).

IX. EMPLOYER MILITANCY IN PROFESSIONAL SPORTS

EMPLOYER MILITANCY IN PROFESSIONAL SPORTS

Ira Berkow, Sports Columnist
The New York Times

Eugene Orza, Associate General Counsel
Major League Baseball Players Association

Joel Douglas

We are now going to look at Employer Militancy in Professional Sports. We are very fortunate this morning to have two speakers; two members of the panel well versed in the topic. We have **Eugene Orza**, as distinct from his brother, Arnold Orza, who is in the audience. He is the Associate General Counsel of the Major League Baseball Players Association. He has been in that position since 1984. Before that, he was with the NLRB from 1973-1984. He has a law degree from Georgetown in Labor Law and a Law degree from St. John's University.

Ira Berkow, New York Times sports columnist, is a graduate of Miami of Ohio. He has a Master's degree in journalism from Northwestern. He has been with the Times for the past fifteen years. Before that he was with the NEA -- The Newspaper Enterprise Association -- not the NEA which of which many of you are members. In 1988, he was a runner-up for a Pulitzer Prize in Commentary.

I am Joel Douglas from Baruch College, which you know. Tonight is a very special night because tonight is a night that a lot of people did not believe would ever come. In fact, two weeks ago many of us sat around Passover Seders and said "Why is tonight different from all other nights?" -- I waited fifteen years for that line. Tonight the Dodgers play the Marlins in Miami and the 1995 baseball season opens up. We are going to look at the militancy issue from the perspectives of a union leader and a sports columnist. We are going to be seeking a great deal of audience participation; whether through the microphone or through questions from the floor or any way you would like it. We are not interested in prepared papers with citations and flip notes -- if you want that, you can read Ira in the Times almost every day, and I am sure Gene has some articles he can share with you too. I am going to ask the audience to watch for certain themes as we analyze, actually, a case study. Are there lessons that we in the Academy can learn from the experience of the baseball strike and other sports-related issues? What was the role of the media? The media has played a major role in labor relations, including their perspectives on the strike. Gene also has mentioned that the Times writers are unionized, the Guild is their representative, and Ira is a member of the Guild. We may have something to look at there. We are also going to look at union discipline. The Major League Baseball Players Association has been called by many as the strongest union in America, not only today but ever, in terms of the respect that members and leadership have for each other, so that is an interesting point. As well as looking at the role of the President, the Congress, the Courts, and the NLRB, there are a whole slew of areas that we can look at. My role primarily is to ask the questions, to feed the questions, to keep law and order, if there is any need to keep law and order.

Also, I just wanted to say a word on the militancy area. I am a "died-in-the-wool" sports fan, an old Brooklyn Dodgers' fan -- we'll never forgive O'Malley -- but that is another story. In recent years there have been seven strikes in baseball. That's a lot of strikes. That's even more than Long Island University has had, for those in the business. Also, in the last year or so, there has been a lockout strike in the NHL, the hockey players. The NBA just had the resignation of the Executive Director, and people are saying that that's geared to perhaps the next round of collective bargaining coming up. Football players have a cap and a labor agreement that I think runs through 2000. I have a copy in my office of their CBA. The jockeys had some labor issues over the past year over the health care issue. The major league umpires, as we speak tonight, are locked out, so that is an issue out there. Even the O. J. jury is organized. So anyway, there is a lot out there. Why don't we start with Gene Orza to give us an overview, then we'll ask Ira for an overview, and then we'll take questions.

Eugene Orza

I want to thank Frank for inviting me. Last night Ira and I had a brief conversation in which we both agreed that you did not want to hear lengthy dissertations from the two of us. You wanted to ask questions and we'll be happy to try to answer questions on the main subjects. I obviously cannot address all of the subjects that Joel has alluded to in a brief period of time. I'll be very, very brief. The question of employer militancy or increased militancy in sports is a very simple one from where I sit, from my perspective. It's simply a question of the stakes. We live in a time in which there is a great deal of money in the operation of sports franchises. If I had told you a year ago, when people were laughing about what VIACOM paid to buy the Rangers and the Knicks and Madison Square Garden, that indeed they would sell it for twice the price -- over $1.2 billion within three years, at that time you would have said I was crazy. All of this talk you have heard about how baseball cannot survive under its current economic conditions, and you notice that there are teams dying to expand, to be part of the expansion pool, fighting with each other, great efforts made by local municipalities that do not have sports franchises to get them -- why? The answer is very simple; there is a connection between the growth in telecommunications and the ability to run a sports franchise. The clubs have this habit of always having an unfortunate observation made during the middle of a strike or a lockout, whichever the case may be. That is probably why they have all these gag rules. I have always wondered about these rules the clubs adopt where they have the twenty-eight wealthiest people in the United States and they say they can't talk to anybody for the next eight months. It's kind of interesting. I would love to be a fly on the wall at those meetings but they manage to slip out a word or two to the press, and when they do, Ira, the columnist is always happy to hear it. But when Hizinger said in the middle of one of Bud Selig's speeches about how baseball was dying, that all the franchise values would go up $200-$300 million in light of the sale of the Rangers and the Knicks. The important point, it seems to me, to recognize is that militancy is a function simply of the recognition in the sport that there are huge dollars that await the increase in franchise values. Everything else is, for want of a better term, "bull." You have to understand that it is simply a case of their power vs. the players' power in dividing up what that increase in revenue will be. Why the clubs do not like the current system is very simple. The clubs do not like the current system because as a cartel, all they have to bid for, the only thing for which they compete, they don't compete for stadiums, they don't compete for growth industry, they don't compete against anyone for anything except against fellow clubs for players. As a result, all the incremental increases in the revenue produced, as the laws of economics will tell you, a greater and greater expenditure on players because as the only thing you compete for, the more money you get, the more you have available to spend on the only thing for which you compete. So when you see newspaper articles or studies suggesting there has been an increase in players' salaries from 30 percent of the total revenue to 48 percent to 53 percent to 58 percent, where it is right now, and the clubs decry that fact, it is a function of the laws of economics. That is because revenue has increased dramatically in the sport over the course of the years. It has more than tripled in the last eight years alone. It has gone up ten-fold since 1977, the birth of free-agency. That ten-fold increase in revenue has produced a larger and larger expenditure on players' salaries simply as a function of the principle that the only thing the increase in revenue has to compete for is players. You increase the value of the New York Yankees another $200 million and that $200 million will be an even greater proportion than heretofore exists to be spent on players. Well, the clubs want to put an end to that. The clubs want to put an end to that natural economic development. And it is really a depreciation of the club's position and what I would ask you to contemplate at least is exactly that phenomenon -- how the clubs love the free market system when they are the sellers of a product. When they sell their air time to someone, they love the fact that ABC, NBC, CBS, FOX, and Cable are competitors for that air time. When they sell their franchises to various municipalities, they love the fact that Phoenix has to compete against Washington, which has to compete against Charlotte, which has to compete against Tampa. When they sell the right to sell hot-dogs in their ball parks, they love the fact that SK Hot Dogs has to give them a better price than Armor Hot-Dogs if in fact SK wants to sell those hot-dogs in the ball park. So competition is a wonderful, wonderful thing for the clubs when they are the sellers of a service or a product. When they are the buyer of that same product, however, then they don't like competition that much because it costs them money. Their militancy is simply a desire on their part to not mine the gold that they mine but to mine gold and platinum at the same time. Back in the days of Jim Watt, he always used to talk about how we should let Reagan be Reagan; and my referring to the clubs about the negotiations is that we should let capitalists be capitalists. The clubs do not like that idea. They do not like the idea of being capitalists when they have to buy from the great talent of baseball players and that's the final point. The clubs' militancy is an appreciation of the fact that the players themselves have a weakness. They didn't get to be the very best players in the world by not having a great love for the game of baseball. They love to play. They would play the game probably for a lot less than they do, and some do, in fact. You frequently read articles about how players have turned down large amounts of money to play someplace else. The first love the players have, and they wouldn't be there if they didn't, is to play baseball, and the clubs love to tap that. So they believe that in a confrontation, they could always hold out longer than the players. The one thing that the clubs do not appreciate is that, simultaneously, that love for the game exists alongside a very, very fierce competitive spirit and the players do not like to be beaten in competition no matter what it is. I play golf with some of them, they never concede putts. You play gin rummy with them and you beat them, they want to play for the rest of the day until three o'clock in the morning; you will not go away a winner. Those competing strengths are what have created the five strikes and the three lock-outs that we have witnessed since 1972. There really is no magical phrase or magical observation that anyone has. The militancy that you see in sports is the recognition that the NBA has a salary cap. It has made the owners very wealthy and owners of other sports teams say "Gee, wouldn't it be great if we had the same thing too? Because, then, we'll make even more money than what we do now."

Ira Berkow

As a sports columnist, I get all my information from Eugene Orza, so there is nothing much I could add. Except the role of the press. The role of a free press, the role of a free writer is to take the various issues and try to balance them in your mind and then come to a conclusion, which I've tried to do. It happens that I have come down very strongly on the side of the players in all of the issues since I started as a sportswriter in 1965, so I am not sure where that places me. Not long ago a letter from someone who did not sign his name and who called me a "commi-bastard." I took umbridge at this at first and then this Sunday I went to see the foreign film that won the Academy Award, "Burnt by the Sun," a Russian film. There was something about Stalin in there and I just had some questions about him. I guess I just didn't know the whole biography or background of Stalin. But I looked it up, did some research, and I found that Stalin was one of the originators of Pravda, in about 1923 or '25 and he was one of the first editors of Pravda. So Stalin was a newspaper man to begin with, which I didn't know. So I'm thinking "Gee, that puts me in interesting company." On the other hand, talking about fervent capitalists, the Chicago Tribune Company owns the Chicago Cubs. So I'm not sure which side I am at and so I'm back to being perhaps in the middle and balancing both sides of the issue and then arriving at my own conclusions. As the afternoon progresses you may be interested in hearing more of my conclusions and I'll be interested in hearing more of yours.

Joel Douglas

Let me ask the first question. It is an interesting one that has been around, I think. The umpires have been locked out, the season starts tonight. 'Gene, your union will play, I suspect. Does that mean they will be walking across a union picket line? It's a fair question.

Eugene Orza

First of all, it's not a terribly interesting question. In fact, the Umpires Association has given a public pass to the players to play in the game. We did not request it of them. We considered actually not playing the games, not so much because of our love for umpires, or the fact that they want to strike, but because in fact, there were scab umpires in the game. It is the conclusion of the Umpires Association that it might be good for the leagues and for the public, for that matter, to see scab umpires umpire games, and they'll have a better appreciation of how tough a job umpiring actually is. They take the position that subjecting the players to a game in which individuals who are, for want of a better term, scab umpires, are now controlling the course or flow of the game, will be something that will result ultimately to their benefit. They are better served by having the games played than not. As I say, that view of the matter is not far different from my frequently stated opinion and quoted throughout the press that it was important that there actually be the play of some scab games by scab players so the owners would get that idea out of their system, so to speak. I really regret to some extent that we didn't have some scab games, because I really believe that there are a number of owners who think that it will be helpful to them in their bargaining position. However, when they see the damage that it would represent to the sport, they would have quickly changed their minds and become a little bit more interested in a deal. But the short answer to your question is yes, we are going to play, but only because we have the publicly stated permission of the umpires and they request that we indeed play in those games.

Ira Berkow

Gene, there were scab NFL games in 1987, and they were pretty much a disaster. Didn't the baseball owners learn something from that?

Eugene Orza

I think that in fact, from the baseball owners perspective, they view the scab games that took place in football as a success. Those games did indeed induce a large number of football players to break ranks with their union and return to work. On that basis alone, I think that a basic replacement game or scab game policy has a certain kind of caché for some of the owners. The basic problem is that they forget that baseball players aren't football players.

Audience Question

Is Chuck O'Connor history?

Eugene Orza

Well, he's not history in the sense that he's deceased, he's still alive and I wish him a long healthy life. I have a great deal of respect for Chuck and I normally would not comment on that question, but there is an observation that I want to add to it and that is that yes I believe that his services have been terminated by the clubs. But that is consistent with a long history of the club's belief, asserted publicly, that somehow, they did not do it, it was the lawyers that made them do it. You see, they were not responsible for collusion, and they were not responsible for the strike of 1981. It was really Roy Greeby, that guy who took over the airlines and ruined them too, etc., etc., etc. That is the constant refrain of the clubs, "The devil made me do it." Flip Wilson is their guide in that respect.

Ira Berkow

Which is why, Gene, they keep changing commissioners. Up until this point they are very happy with this commissioner who is an owner, but they got rid of every commissioner one way or the other, other than Giamatti who died on the job but they would have eventually gotten rid of him as well.

Eugene Orza

Yes, I just want to say a word about Chuck O'Connor. Chuck O'Connor happens to be a very honorable opponent and adversary. I have absolutely no criticism about the way he has handled himself, he has never lied to me, has never been deceitful or anything like that, and that is probably why he got fired. People that have been retained, on the other hand, have had a less glorious relationship with the players association and it is probably why they have been retained. The industry is at a loss because Chuck is no longer representing management's viewpoints. Although, we very seldom agreed on anything, those disagreements were always on a very principled and professional basis. As far as the commissioner goes, you should be under no illusions. The commissioner of baseball was always, for want of a better term, the minion of the clubs. They spent seventy years of public advertising on the proposition that somehow he was this independent third force that was out there for the good of the game, to restrain them. But in fact, they paid him, they could fire him whenever they wanted to. The key to understanding the firing of Faye Vincent is very simple. Faye Vincent was asked by various clubs to resolve the question of how expansion money for Colorado and Florida should be divided. It's a huge expansion pool, it was a $7 million expansion pool in 1976 for the Blue Jays and the Mariners, and this was a $95 million, maybe $104 million, depending on how you calculate it with respect to the national television package. $104 million per expansion team, $208 million coming into the sport and only the National League was going to keep it; so the American League appealed to the commissioner to divide up the money a little bit differently. Alongside that issue, it placed a second issue, and that was whether he would take up a change in the revenue sharing schemes in the sport. What he wrote was a decision on how the expansion money should be allocated to the various clubs and, in a concluding paragraph to his decision, said, "I have, of course, the authority to alter the revenue sharing arrangements, but I am not going to do it at this time, because I think we should try to handle it in labor relations." And all these kinds of alarm bells went off in the minds of so many clubs officials saying "This guy is really taking himself seriously. He thinks he is going to unilaterally alter our revenue sharing arrangements or that he has the authority to do that -- Sayonara! So it is perfectly consistent with the following principle: the commissioner of baseball can be fired by the clubs anytime they believe that the public relations hit they will take is outweighed by the financial considerations they see to propagate or perpetuate. And that is what happened in Faye Vincent's case. A fairly popular fellow, he had a great deal of public appeal by virtue of the way he handled the 1989 earthquake. People liked the fact that he went to games, he had a certain amount of appeal in that respect. He was a very bright fellow, unlike Bart Giammati, he took both Latin and Greek. Bart never took Greek and that was a source of great con-sternation. When Faye Vincent and I would confront Bart, we would deliberately talk about Euripides. But the short answer is that Faye Vincent started taking himself too seriously, thinking that he actually had power independent of the clubs. That implicated their money, and as a result, they got rid of him. They got rid of him for that reason, and of course the reason that any commissioner who is around during negotiations can serve as a lightning rod for public criticism of the clubs. The clubs like an amorphus kind of a group of seven or eight people making labor relations policy for them. So the commissioner of baseball was fired for the very simple reason that he did not remember that he is simply a minion of the clubs.

Audience

One of the main sources of scabs is of course the minor leagues. Has the Players Association been interested in helping to stop that by organizing the minor leagues and if not, why not?

Eugene Orza

We believe it is in minor leaguers' best interest not to be scabs for a simple reason. I'll tell you a little story. In 1969, Marvin Miller took the first strike vote for the Players Association. They did not go on strike as it turned out. He was in Los Angeles at the time and the vote he took was 27 to 2 in favor of going on strike. Walter O'Mally read about it in the newspaper and called up Marvin and said "I need the name of those two guys who voted against going on strike." Marvin said "You're crazy, I am not going to tell you the name of the two people who voted against going on strike." Walter said "Well I have to know, I have to get rid of them. I can't have them in my locker room with the 27 guys who voted to go on strike." In fact, the clubs may call up here and there a scab player over the course of this season, but their careers will probably not be long for the simple reason that general managers will realize that to win a pennant, what they regard as their ultimate goal and that's how they retain their jobs, that's how they get to be voted the executive of the year by guys like Ira; they will see them as a source of chain disunity. Imagine what would happen if a scab charged him on the mound and nobody came to protect him.

Ira Berkow (interupting)

But the only problem with that is that if the player is so good that he is going to help lead them to a pennant and then I think that . . .

Eugene Orza (interupting)

If the player is so good then the clubs would have never asked him to be a scab which is what the New York Mets did. They took their best prospects, Eric Palcifer and Pauls, and said "Whatever you do, you don't play in the games, we don't want to subject you to this phenomenon precisely because we think you are good. If you look at the scab lists you'll see all the players who played in those games that there are, in fact, no prospects.

Ira Berkow

Eugene, my point is this, at times a player develops and if the other players are realists that if this guy is going to be a contributing factor in our ball club, well, let's have him in our locker room.

Eugene Orza

You wait and see, OK? As far as the second part of your question, I was trying to think an answer to it. How many people in this room have been to two minor league games in the last three years? That's essentially what your problem is. The minor leagues are a loss leader for the industry as far as major league baseball is concerned. They are composed of teams that get subsidized by major league baseball, so what you can do in the minor leagues is very difficult because that's why you see so many minor league teams springing up year after year where other minor leagues used to be. It's a very volatile industry in terms of its stability. We are, in fact, attempting and seeking to organize AAA Minor League Clubs because they seem to have greater stability and there are greater investments in those clubs for the purpose of player development. But to organize everybody in single seasoned, short seasoned A Ball, or instructional league is a huge task and one not destined for success, given the degree to which there are these negative cashflows in those sports. They exist basically on the subsidies major league baseball gives them to develop talent for them and don't make any money. Trying to organize them and getting money out of that cow which is not cash filled is a very difficult process we think.

Audience

What about the idea of changing of anti-trust exemption, is it still alive, is it going anywhere, and what's your position on it?

Eugene Orza

The anti-trust law question is a subject upon which I can and have discoursed at great length. Let's just put it this way, I believe that no matter what the current state of the law is, in time, the anti-trust exemption the clubs enjoy will be repealed. I believe that because in time, it seems to me, it is inevitable, that the millions and millions of people who have no connection to baseball but are directly affected by the anti-trust laws will come to see it as having that adverse an impact on them and will demand that it be repealed. I will give a concrete illustration about the principle that I am talking about. If you were the Mayor of San Francisco, and I were the owner of the San Francisco Giants, and I said, "Arnold, unless you give me some repairs on my stadium, some floats and tax-free municipals for me, give me more parking and a greater percentage of the gate than I now enjoy, unless you do that, I am going to go to Duluth." You would say, "Gene, I have to reschedule this appointment, come back and talk to me next week." He'd probably be more polite than that, perhaps, but he would essentially say "You're not going to go to Duluth." That's because you know Duluth cannot harbor a franchise, it's just not big enough. If I would have said to you "I'm going to go to Tampa," you would listen. Of course, the question then becomes "Why is Tampa empty?" Look at it this way, baseball essentially boycotted the state of Florida until 1993. Can you imagine General Motors saying, "I'm not going to sell cars in Florida"? or NBC saying, "I'm not going to broadcast there?" Why was Florida empty? It was empty precisely because it was a vehicle for us to leverage San Francisco. Now, as the Mayor of San Francisco, you don't want to lose the franchise because you know it will be the last time you ever get elected to anything. So you come up with that $300, $400, $600, or in the case of the Chicago White Sox in the state of Illinois, $30 million. Where does it come from? Where does that money come from? It comes from the fire budget, the sanitation budget, the school parks program. When Minnesota gets leveraged, Minneapolis/ St. Paul gets leveraged with the existence of a vacant Denver. The money that they paid in Minneapolis came from the parks budget. Now, there is a guy who enjoys that park who has never been to a baseball game and he doesn't know that the reason he is getting harpooned is because of the baseball exemption. But the truth will ultimately set that guy free. The best illustration I can give you is a football illustration. When Carol Rosenbloom wanted to move the Los Angeles Rams to Irvingdale, they gave him that approval before he could say, to get back to the right sport, "Jackie Robinson." Why? He was creating a vacancy in Los Angeles and occupying the otherwise vacant, hitherto vacant Irvingdale - Big Deal! Three weeks later, Al Davis says "Hey, L.A. is vacant, I'll take it." Time out. Now the trade is Oakland for Los Angeles -- can't go. Why? Because the ethics the clubs have in any sport is that those vacant cities are owned by them. Now let's reverse the picture. Imagine they are covered by the anti-trust laws and in their infinite wisdom, the Justice Department breaks up the American and National League and says "You must go back to being competitive leagues." After all, they were merged for the sole purpose of depressing salaries. The American League and the National League in 1903 were fighting with each other over salaries and they said, "I got a good idea, let's merge." And by the fortuity of Justice Holmes decision they are now able to do that. But now let's say we would break them up and now you are the mayor of Tampa, I am the representative of the competing American League where Ira would be in the National League. I call you up and say "Mr. Mayor, I'd like to play in your town." And you say to me "Well, that's funny Gene, because this guy, Ira Berkow, just called me about two days ago and he told me that he'd build the stadium for free and give three thousand low income housing units if I could do it." "Mr. Mayor, no problem, I'll match Ira's offer and I'll throw in free school buses for the next two years." And now you have the way public policy should be shaped, private consumers competing for the municipalities wealth. We have turned the world upside down by virtue of this anti-trust exemption. We say to the world, "I got a good idea, let's have in smoke-filled rooms in Wisconsin, twenty-eight rich millionaires, billionaires in some cases, get together and dictate social policy for us." So anytime, this kind of truth will set everybody free.

Joel Douglas

What time frame do you give this?

Eugene Orza

I don't know but it will happen though. In the great scheme of things, the time is irrelevant.

Ira Berkow

If I may say something at this point. Gene was talking about the anti-trust exemption, that it would eventually be repealed. It has to be repealed by Congress and why it hasn't been repealed so far is that, I'm sure Gene will agree, there has been a kind of bribery by the baseball owners of the various senators and congressmen to do their bidding. Now, it seems to me, taking the example of senators from Minnesota vs. senators from New Jersey, wouldn't it be that one set of legislators would simply balance off the other set of legislators and the status quo remain?

Eugene Orza

Yes, as long as the issue is confined to baseball. I'm talking about the discussion of the issue. In fact, most Americans are not baseball fans. There are 290 million people in this country. I'm talking about all those other people who have no connection to the sport when they find out that indeed this baseball issue has currency for them, has meaning in their own lives. That will overwhelm the ability of the senator, John Warner, for example, to simply say "Well, I got bought out of my vote because I promised to put a franchise in Northern Virginia." Then somebody is going to say, "Well, wait a minute, that's very nice of you that you did that, but I don't want you to do that because, in fact, I've got no love for baseball. I don't want part of a system where people get leveraged like this in the municipalities.

Ira Berkow

But if they haven't found out in the 73 years since the Holmes decision, why would they be finding out in the next few years?

Eugene Orza

Well, we have to educate them better. It's like anything else, if they hadn't found out that the world was round for the last 300 years, why would they believe it? Because people had insights and ways of proving that, in fact, they should not think the way they used to think. Time itself will give people the opportunity to educate more and more people about the impact of the anti-trust laws on their lives.

Ira Berkow

It's amazing how people resist education.

Audience

There were two strikes this year in professional sports, almost a third this year in basketball and the jockeys in New York were locked out or something. I wonder if the two of you would comment on the strategies of both strikes. They were both very different and one settled and one did not settle. So why did we have a settlement in hockey and no settlement in baseball? I thought that baseball tended to have much more of a legal strategy than hockey. I'd like you to think about that. And the role of intervention in the two strikes, that is to say, you went to the White House to work on this strike, Gene, why didn't the commissioner of hockey, Gary Bettman? And my final part of this is what about the fact that we're dealing in hockey much more with Canadian law as well as United States law? And I know we deal with that in baseball too, but not as much as in hockey. Does that have an impact as well?

Ira Berkow

There's a matter between hockey and baseball of organization, and commitment by the union members. Baseball, to its enormous credit, is very strongly-led and not just by the people in the office over there in Park Avenue, but the player representatives. They have all been made aware and feel deeply, it seems to me, where they've come from and understand, it seems to me, even though some of them are making millions of dollars, they have a commitment to the history of where they came from. As far as another one of your questions, baseball is such an important part of the fabric of American life that people really care about it whereas hockey really has a small corner of our hearts, and in many of us, it has no place at all in our hearts.

Eugene Orza

The choice of hockey vs. baseball is a little bit unfortunate. Football or basketball vs. baseball might have been better because hockey is, in fact, colored by the issue that it is essentially a sport that is Canadian in origins. In Canada, when you are born, you get skates before you get shoes, and has almost a religious aspect to Canadians the sport of -- Canada. Part of the bargaining strategy there, I'm sure, is on the part of the owners, and I give Bob Goodenow a great deal of credit for this. I'm sure the owners, I know some of them, said, "Hockey players don't go on strike," because it tears up the very familial fabric in which they live. You are not going to play hockey? -- It's like not going to church. And so that was part of that strategy, hockey almost having religious proportions to so many Canadians. The first thing they tell you is that the English don't play hockey and the Canadians do, and that's their retribution, so to speak, for their colonization.

The President did not intervene in the hockey situation simply because hockey is a Canadian sport, it's not an American sport, there is no national T.V. coverage of any great length. There are a lot of fans of hockey, there are rabid fans -- Ranger fans -- who would eat their young for tickets. But the fact is that it retains this notion of not being part of the same romantic traditions that we associate with baseball. And, what would be the political benefits to the President? If the President were to end the hockey strike, whenever it takes place, how much bearing would it have on electoral politics? Maybe some, I think marginal at best, and I think we'd all agree. If the President were to get personal and particular credit for ending the baseball strike, he might have a substantial impact on the electoral process and as a result, the goal, the objective is the reward if you are successful.

Ira raised a point that is important and I think bears repeating and that is the relative success of the Players Association in baseball vs. those in football and basketball. Basketball, of course, is seen as a very successful sport, only because the owners are so happy in having gotten their salary cap. They got their salary cap in 1980 only because they convinced the union that the sport was in trouble. The salary cap is designed to address an economic problem that a franchise has because it makes more money for a club than it otherwise would make. And they regret doing that today. I'm sure that if you would take a poll of the basketball players they would undo the salary cap instantly. Football, of course, was effectively broken in the early 80's and now there is great disaffection among the players for the system under which they play. I don't think that success of the Baseball Players Association has much to do with its staff at all, including people live Marvin or Don. I think that the real key to understanding the success of the Players Association is the existence of the minor leagues. When Tony Dorsett comes to play professional football, his life doesn't change very much. He is still playing at a huge stadium, just like he did. He's still playing in front of 75,000 people, just like he did. His car is still a Mercedes, just like it was. And his salary has gone up a little bit, but not appreciably. And the same is true if you take a basketball player, Shaqueil O'Neil who comes to the NBA. His point of reference is non-existent. You take Doug Decensis who played in Elmira and got shot at by a sniper in the hills and the dirt was going up around him, while Carl Ripkin, Jr. -- his favorite habit is only 25 feet away on a third baseline with his father at the time and making $250 a season. $50 a month, living in lousy hotels and rotten buses going over mountain tops and breaking down and having to get out and actually having to fix the tire yourself because the driver couldn't do it by himself. And then he comes to the Baltimore Orioles and he's standing next to Frank Robinson in his spanking new uniform, 58,000 people, and they have an unlimited supply of Barbasol and throw-away razors and he turns to Frank and says, "Boy, this is really good!," and Frank says, "Yeah, it's the Players Association;" and that bonding that takes place and seeing how baseball could be played and how it is played; that point of reference for baseball players is very, very important. Basketball players and football players don't necessarily see it, they have to even intellectualize it, they haven't lived it. The minor leagues are like the bar exam and internship for doctors and lawyers. When you are taking the bar you always say, "Why do I have to take the bar exam? It's ridiculous. I studied for three years, I'm sixth in my class, if I flunk the bar exam I can't practice law? It's insane." And then you pass the bar exam and four years later you say to a kid you overhear saying the same thing "No, no, no, it's really good training, it really is good for you." Doctors do the same thing with internships. Minor leagues are like that for baseball players. It is a proving ground for them and it makes them understand the value of collectivization much greater than the basketball or football player.

Ira Berkow

Gene, that's a nice theory. But I have a question for you on this. Before Marvin Miller showed up in 1966, there had been minor leagues for about 100 years and there had been attempts to organize major league baseball players that failed. Now, Marvin came along and for whatever the reasons, but I think you'll agree that he was a superior leader, and he was able to organize very effectively, and convinced the players, among other things, about their minor league experiences. You and Fehr came along in the extremely excellent footsteps of

Miller and this is why the baseball players have the kind of union that they do. I'm not only suggesting that you are being modest, but you are being wrong. The minor leagues had existed for 100 years before Marvin Miller and the Players Association.

Eugene Orza

Well, I don't mean to denigrate, and certainly never have, anything that Marvin has done. Marvin built a fabulous institution and he deserves all the credit in the world for it. What I'm suggesting, though, is that Marvin's task was not as difficult a task as it has sometimes been portrayed. I think Marvin himself will tell you this. Marvin told me a long time ago, when I first came to the Players Association, he said "Gene, in the end, the players always do the right thing." And they do it in the context of their union. I think that what really binds them together in that is not their leadership necessarily. Marvin has this great talent where he can have this meeting in a room and a consensus will emerge in which all the people who are part of the consensus believe that it was their idea they just voted on, when in fact it was Marvin's. But they all go away believing that they were telling Marvin what to do. What I am saying, though, is that the existence of the minor leagues as a counterpoint only takes meaning once you establish the new conditions which can serve as the counterpoint. And those conditions, I might add, were served quite fortuitously by forces greater than just any individual. Kirk Flood lost his case which started in 1969 and ended in 1972. All law students when I talk before them always say "Well, Gene, how come free agency only came into existence in 1976? Why didn't anybody else, like McNally, hold out to create the foundations for the free agency tests until 1976, seven years after Flood tried it with Philadelphia?" And the answer is very simple, nobody knew, including Marvin, what free agency meant until Catfish Hunter's contract. Catfish Hunter was really the first free agent in the sport to breach contract action when Charles Finley failed to pay insurance premiums. Catfish went out and was able to sign a contract fifteen times bigger than anybody else's in 1975. And everybody said "You know, this free agency stuff, maybe it's serious, it may be a big deal." That's why the battle for free agency took place fully ten years after Marvin came on the scene, and quite fortuitously I think, because of Charlie Finley's failure to pay an insurance premium, that free agency was seen to be a big deal.

Ira Berkow

And Steinbrenner's willingness to pay the money.

Eugene Orza

Oh, absolutely!

Audience

What is going to happen to Ontario umpires?

Eugene Orza

There's a hearing tomorrow on that subject. I was talking with the Umpires Association on this very subject shortly before I got here. That is why I was a little bit late. Interesting question. The umpires work for the leagues and not the clubs. Unlike the players who work for the clubs. But the early indications I have are that Ontario law will apply to the Toronto Blue Jays because they have a worksite in Canada, where work will be done and there is work strike being done at that site in Canada, mainly the work of the umpires. So I think Richie Phillips, the head of the Umpires Association, may have a good case, I'm just not that conversant in Canadian law, I've tried to become more so over the course of the last eight months. Canadian law is very difficult because of the overlay of Federal law and the interplay of Provincial laws. For example, the immigration issue that I was directly involved in, has a Federal overlay, an essentially different Provincial law with respect to replacements. So Toronto could not hire replacements, Montreal could, but neither could get immigrants to do it by virtue of the overarching Federal law.

Ira Berkow

One thing I'd like to say here for a moment, because many of the people here are teachers. One of the reasons, I think, for the success of the Player's Association, and Marvin Miller to begin with, I know Marvin started in college wanting to be a teacher, and he learned certain techniques, I believe, along these lines. Marvin is able to express himself, as Gene said, in an interesting kind of way, where somehow or other after a while, you begin to believe and appreciate his position and to convince you of the rightness of the position. And he did it with facts, but he also did it another way. He's never condescending in talking to you. This was an issue when he started with labor that many sportwriters were totally ignorant of, and many still are, present company may not be excluded. But what he did and the way he did it was always kind of like a teacher. I always accused Marvin Miller of talking at note-taking speed. He never went so fast that you would begin to get lost in it and they were complicated issues. He explained them to you as if it were a class and as if he were a very gentle and generous teacher. I think that was part of the success, because writers began to write and take his position and eventually, I think, it became influential. It is interesting that Sotomayor, the judge in the case which returned the players to the field, when asked what she knew about the labor problems, said, "Well, all I know is what I read in the New York Times," and the New York Times was very much for the players.

Eugene Orza

We spent the entire three days talking exclusively to the New York Times' reporters and no one else.

Audience

Now that there's no lockout what will happen in September, or after the season, with regards to the prospects of baseball, if there is no settlement? How will it affect your ability to do your job with the players as far as representing them?

Eugene Orza

It is true that we do not have an agreement. It was my hope that the re-introduction of play, the resumption of play, would allow some members of the ownership committee simply sit back and take stock of where we are, how we got there and maybe take a less than transient attitude towards the negotiations and hopefully see Judge Sotomayor's opinion not as a defeat but as an opportunity to take a day or two off and come back with a different kind of approach to the negotiations. Unfortunately, everything I see or sense or smell going on suggests that all they are doing is licking a wound here or there and coming back for more and wanting to fight, because they are intent on simply getting their way because, "We are owners, we own things, that's what we do for a living and you play and that's what you do, we own and you play." That kind of an attitude is not a constructive one in trying to forge an agreement.

As for the future, I don't know. It is also my hope that as time goes down the road in the season, people will have less and less a stomach to fight the game. But if the players are left with no alternative, indeed, they will exercise whatever leverage they have to deter an ownership group that is simply intent on forging all these special rules for themselves whereby they don't have to pay people what their market value is, then we face a confrontation. When that confrontation will take place, I don't know. The players have a huge piece of leverage, of course. The players could play the entire season and shut down the World Series a second year in the row and effectively spell the death of the sport. And there are players who are perfectly willing to do that, if you push them to that limit. The clubs have great leverage and, that is that the players, whatever you say about them, do have an abiding affection for the game. That's the tension right now that exists as we speak today. "I know I have great leverage, please don't push me to use it because I really like the game and let's see what we can do." Hopefully, that attitude if it becomes part of the consciousness, so to speak, of the clubs, then, we could hammer something out before the end of the season. If we can't, then I don't know what the future holds but it will not be a good future.

Audience

Has there been a shift in power between the big clubs vs. the small clubs?

Eugene Orza

What the clubs have done this time around (there's probably some small shift and I hope that we'll see a bigger shift as the game unfolds because owners like the game too) is that they have bribed a lot of owners. You are a small market club. You don't give a hoot about a salary cap. You don't even know if there is going to be a salary. You don't even have that much money to begin with. I do. I'm a big market club and the salary cap is principally a benefit to me. So I come along and I say, "Joe, you stick with me and I'll give you seven million dollars a year." Seven million dollars a year? -- That's a 15-20 percent increase in your gross revenue. You are really happy! The notion that the small market clubs are driving this negotiation silly is that the big market clubs that are doing it. The proof of that is the Congressional Research Service you may have heard about. The Library of Congress has a Congressional Research Service. On their own, they pick out issues which they think might be of interest to Congress. Legislation is coming up on the Hill about the Anti-Trust Exemption, so they did some research on the baseball negotiations. They modelled the clubs' salary cap proposal against

1994's experience and they concluded that salaries would have gone down $160 million and $39 million of it would have gone to the small clubs. That's exactly my theory which is that you save all this money and I'll give you a big chunk of it, if you just stay as my ally because if I lose you as my ally I won't have enough votes. And I know there's no natural reason for you to be my ally; you don't care about a salary cap. So what I'll do instead is replace the benefit you gain from the salary cap which is zero with actual ballots and I'll give you a reason to support me. That's why the Boston Red Sox, that likes the salary cap is willing to pay somebody else the revenue sharing. We have even argued that there should be greater revenue sharing. Our proposals in negotiations gave, in fact, small revenue clubs more money than the clubs did. But we did not tie it to taking it from the players' salaries; we tied it to the revenue streams of the sport itself.

Ira Berkow

Your question was how would the players react to those who took the owners side in the media. And you mentioned Russo, whom they call "Maddog Russo," that's the name he goes by -- I call him "M.D." I remember once going to the Yankee's locker room three years ago, when Getty was a pitcher with the Yankees. I had a question to ask him and I had a good relationship with Getty and Getty is a pretty bright guy, fairly well read. I asked him a question and he said "You know, I better not answer that because if the guys in the club house here read it, then they will get on me and it won't be a good thing." Then he paused and then he said "The guys in the club house don't read the Times -- I'll tell you."

I find that in many cases, if you are not writing personally about them then they don't really know what the by-line was or who said it. They are not listening to Russo along these lines.

Audience

So far, there have been reports that sales for the opening game have been extremely light, even with the incentives that some of the clubs are offering. It seems as though the fans have maybe come to the conclusion of saying, a pox on both of your houses and it probably reflects a changing interest in baseball.

Eugene Orza

Yes, I think that the percentages have not been great. There has been a drop, but not a precipitous drop. It is understandable that there are some fans who are making this as a statement. But my belief is that as soon as their teams get involved in the pennant race and there's excitement brewing and their kids are reading about it and going to the ball game, if all things have been equal as it has in the past, then all these people will be coming back. Sure there may be some people who stay away forever. A number of years ago, I remember walking down the street and a friend of mine who had just taken a cab said, "I'm never taking a cab again, because they just raised the price ten cents." Well, that was fifteen years ago and this guy is now taking cabs. I know that, I saw him taking a cab not long ago. So I think that the same principles will hold.

Ira Berkow

Three quick observations. In September, I did an interview with Chris Russo, where he told me that he didn't care anymore because the strike had ruined the season, etc., and he would never go to another baseball game. Four months later I interviewed him again and before I asked him a question I said, "Why are you calling me? I thought you didn't care anymore" -- he cares!

Second observation. Sales may be down if you compared opening day to opening day. But how about if you compared April 25th to April 25th? In other words, I was looking at that. April 25th -- NBA playoffs are about to begin and there are other things going on. We may have lost a period April 3rd to April 24th but April 25th sales compares to last year's April 25th sales -- guess what -- they are higher.

The third observation is the empirical one. In 1981 we had a strike which if I gave you the copies of the Sporting News and you read it, you'd think you were living in 1994 or 1995. How the sport was truly harmed, etc., etc., etc., and in fact, in 1982 a record attendance was set. In 1985 there was a strike and those articles "We can't have a strike again, you are going to kill the sport." And in 1986 record attendance was held. I'm not saying that we are going to have record attendance in 1996 but I would not bet against it if I were you.

Joel Douglas

Did you misread the owners this time, Gene? Because there are owners who said, "We've lost all other seven battles, this time we are not going to fold."

Eugene Orza

No, because I realize how nonsensical that kind of observation is. The owners did not lose the 1985 negotiations. They got back an entire year of salary arbitration. We broke the historical link between the national t.v. package and the pension contribution. The owners know they did not lose the 1985 negotiations. They did not lose the 1990 lock-out. We made an agreement with which we were both very happy. Sportswriters like to keep records -- 7 and 0; 6 and 1; 5 and 2. The whole thing is just silly. I didn't misread the owners and neither did the players. The owners don't like free-agency because free-agency makes them do something that a cartel shouldn't have to do -- compete. They don't like competition.

Audience

Referring to the Sunday meeting, why was the timing so bad for the NLRB action?

Eugene Orza

The short answer is that the timing relates to what the issue was that the court decided. The clubs did not announce the unilateral aggregation of a player's right to discuss a contract with an individual club. All bargaining in the Players' Relations Committee was centralized until late February. Then they settled, so to speak, that issue with the NLRB. They thought the NLRB didn't understand what, the clubs did. They reinstated the issue and it had to be reinvestigated, etc. So I'm not sure about the particular issue that resulted in the resumption of play through Judge Sotomayor's order. The enjoined conduct did not take place until much later. The necessity for acting only on the enjoined conduct while leaving everything else in an investigative posture, was occasioned, by distant desire, to get no replacement games played. Forget Spring Training for a moment. The key event in the negotiations, from our standpoint was the playing of scab games. If the clubs had put scabs on the field, for any appreciable period of time, it would have made the ability to forge an agreement that much more difficult. I think we recognize at least that the goal is to stop that from happening. So we pick up Spring Training right when actual games are supposed to begin. The actual game date is the key, so while we may have lost games by virtue of that phenomenon, the goal always was to make sure the actual games were not played with scabs. I'm not going to mislead you to suggest that there weren't timing issues that we discussed at great length, but the issue did not arise in mid-February.

Audience

Is there a way to maintain competition for players and salaries, but to keep them at the same clubs. When I grew up in Detroit, the same people played for years and years and years. Now my 10-year old does not know the Cincinnati Reds from one year to another. I see that as a threat to the game.

Ira Berkow

The history of baseball has shown a great deal of movement by not only ball clubs but by the players themselves. It's true that Babe Ruth played most of his career with the New York Yankees, but he played with three teams. The problem with that, of course, is that in those days there was a reserve clause and it was difficult for players to move and the only way they could move is if they were sold by the owners. So people talked about loyalty to the teams, but these players had to stay there, they had no choice. We still have a lot of players playing with one team -- Ripkin is playing with one team -- and there are players who don't want to move, who like staying with one team. And even right now, the Mets or the Yankees, if the Mets begin to make a run for the pennant, now we hook on to Jimmy Key, of course, Mattingly has been there the whole time, he hasn't wanted to move. And we hook on to the new shortstop Fernandez, and we have a new pitcher here and a new outfielder there. And suddenly these are the Yankees -- these are OUR Yankees. And that is the way baseball has always been in the same way that college sports have been. Every year, there is a tremendous change over. Sometimes there are players who play for four years in basketball with a college which you almost don't do anymore, because if they are good starting as freshmen then they will probably be gone by the time they are juniors. So nobody really complains that there is too much flux in college basketball. We have been used to, because of the reserve clause, having one player stay with one team, but we still have that. And I wonder how much greater are the percentages of player flux today than it was thirty years ago.

Eugene Orza

Not much because of trades. Trades have gone down. There used to be a lot of trades. Then it was just a question of the clubs deciding who to change. Now the players decide who to change. I got to tell you with all due respect, I don't believe that at all. I believe it helps the sport.

Joel Douglas

I would like to thank our two speakers for a wonderful presentation and have a wonderful afternoon.